Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JILL GAVLE

Petitioner,

v.

LITTLE SIX, INC., A FOREIGN CORPORATION
d/b/a MYSTIC LAKE CASINO, et al.

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI AND APPENDICES

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the defense of tribal sovereign immunity applies to a Native American owned corporation, which is separate and distinct from the tribe, when it conducts business off the reservation?

B. Whether a Native American owned corporation waives the tribal sovereign immunity defense, when the corporation appoints an agent for service of process and irrevocably consents to be sued in Minnesota courts for purposes of voluntarily obtaining a certificate of authority to transact business in the State of Minnesota?

LIST OF PARTIES

Petitioner, Jill A. Gavle is an individual and a United States citizen living in the State of Minnesota (hereinafter "Gavle"). Respondent Little Six, Inc. (hereinafter "Little Six") is a for profit business corporation engaged in gaming and other enterprises on and off the Shakopee Mdewakanton Sioux Indian Community Reservation in the State of Minnesota. Three individually named defendants, Leonard Prescott, Allene Ross and William Johnson are not parties to the appeal or the decision of the Minnesota Supreme Court below.

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 555 N.W.2d 284 (Minn. 1996) and reprinted at Appendix A. The opinion of the Minnesota Court of Appeals is reported at 534 N.W.2d 280 (Minn. App.1985) and reprinted at Appendix B. The order and decision of Scott County District Court in the State of Minnesota (Howe, J.), granting summary judgment for Respondent, is unreported and is reprinted at Appendix C.

JURISDICTIONAL BASIS

The judgment of the Minnesota Supreme Court was filed on October 31, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a). The petition herein was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

U.S CONST. art. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1605, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
>
> > (1) in which the foreign state has waived its immunity either explicitly or by implication. . . . ;
> >
> > (2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere. . . .

28 U.S.C. § 1360 (Public Law 280) reads in pertinent part:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State: . . . Minnesota. . . . All Indian country within the State, except the Red Lake Indian Reservation.

MINN. CONST. art I, § 4

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.

MINN. CONST. art. I, § 8:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Minn. Stat § 303.06, Subd. 1 (1994):

> Application for certificate of authority.
>
> Subdivision 1. Contents. In order to procure a certificate of authority to transact business in this state, a foreign corporation shall make application therefore to the secretary of state, which application shall set forth:
>
> (1) The name of the corporation and the state or country under the laws of which it is organized; . . .
>
> (5) The address of its proposed registered office in this state and the name of its proposed registered agent in this state;
>
> (6) That it irrevocably consents to service of process upon it as set forth in section 303.13, or any amendment thereto; . . .

Minn. Stat. § 303.02, Subd. 6 (1994):

> Process. "Process" means any statutory notice or demand required or permitted to be served on a natural person or a corporation, and includes the summons in a civil action, and any process which may be issued in any action or proceeding in any court.

Minn. Stat. § 303.09 (1994):

> Powers same as domestic corporation. After the issuance of a certificate of authority by the secretary of state and until cancellation or revocation thereof or issuance of a certificate of withdrawal, the corporation shall possess within this state the same rights and privileges that a domestic corporation would possess if organized for the purposes set forth in the articles of incorporation of such foreign corporation pursuant to which its certificate of authority is issued, and shall be subject to the laws of this state.

Minn. Stat § 303.23, Subd. 1 (1994):

> Certificate Issued By Secretary of State.
>
> Subd. 1 Prima facie evidence; recording. Any certificate issued by the Secretary of State pursuant to the provisions of this chapter; and copies of the certificates certified by him, shall be prima facia evidence of the matters stated therein.

STATEMENT OF THE CASE

Petitioner Jill Gavle is a female citizen of Minnesota who worked for Respondent Little Six, Inc. ("Little Six"), a for-profit business corporation formed under the laws of the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribe. Respondent managed Mystic Lake Casino in Prior Lake, Minnesota and operated other businesses in Minnesota and North Dakota. During 1991, Respondent voluntarily registered in Minnesota as a foreign corporation under Minn. Stat. § 303.01 et seq. (the Minnesota Foreign Corporations Act) and obtained a certificate of authority to transact business in Minnesota. The written application process under the Minnesota statute contained language whereby the Respondent "irrevocably" consented to service of process and agreed to be bound by the laws of the State of Minnesota.

As an employee, Petitioner Gavle worked as a security guard for Respondent both on and off of the trust lands and reservation upon which the Mystic Lake Casino complex was located. In particular, Petitioner frequently worked at Respondent's corporate headquarters located off the reservation. (App. 70-71). Many of the underlying facts also occurred off of the reservation. Petitioner's Complaint in State court alleged that she was subjected to assault, sexual harassment, racial discrimination, pregnancy discrimination and other actionable conduct by three corporate directors and officers of Respondent. When Petitioner became pregnant by defendant Prescott (i.e., Little Six's Chairman and top executive), she was threatened, harassed and her employment was terminated due to her pregnancy. She was also threatened and forced to leave the State of Minnesota so that her pregnancy would

remain a secret. Petitioner fled to the State of Arizona early in her pregnancy and eventually gave birth to a daughter while in Arizona.

On October 10, 1994, Petitioner commenced this action in Scott County District Court in the State of Minnesota, asserting employment related claims under state and federal law. Respondent brought a motion to dismiss Gavle's Complaint based upon the defense of tribal sovereign immunity, claiming that Little Six, Inc. was part of a federally recognized Indian tribe, that as a matter of federal law, was immune from Petitioner's claims. The District Court granted Little Six's motion for summary judgment and dismissed Petitioner's complaint. (App. 56).

On Petitioner's appeal, the Minnesota Court of Appeals affirmed, holding that the State court had jurisdiction over Respondent, but found no waiver of the tribal sovereign immunity defense. (App. 40). The Minnesota Supreme Court granted review.

On October 31, 1996, the Minnesota Supreme Court affirmed the dismissal of Petitioner's action against Respondent, finding again that the State court had jurisdiction in the action, but that Respondent's claims were barred by *tribal* sovereign immunity. (App. 1). There were two strong dissenting opinions accompanying the decision of the Minnesota Supreme Court. (App. 31-38).

I. REASONS FOR GRANTING THE WRIT

A. The Opinion Of The Minnesota Supreme Court Is Inconsistent With This Court's Previous Opinions Interpreting The Application Of Tribal Sovereign Immunity To Tribal Businesses Operating Off The Reservation.

1. Assertion of Tribal Sovereign Immunity.

The opinion below is inconsistent with this Court's decision in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), in which the Court considered the question as to whether a ski resort owned and operated by an Indian tribe,

but which was located outside the boundaries of the reservation, would be subject to New Mexico's gross receipt's tax. The Court held that:

> The upshot has been repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted by federal law. . . . But tribal activities conducted outside reservation boundaries present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' *Organized Village of Kake*, supra, 369 U.S., at 75, 82 S.Ct., at 571. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

Mescalero, 411 U.S. at 148-149. Petitioner in the instant case has merely sought to enforce contract, tort and human rights laws that are applicable to all persons and corporations in the State of Minnesota. Respondent, Little Six claims in substance, that the federal law doctrine of tribal sovereign immunity allows it to: (i) conduct commerce in the State of Minnesota in corporate form; (ii) injure its employees and other United States citizens in the course of its business dealings, and (iii) then avoid legal responsibility for its actions on the grounds of tribal sovereign immunity.

In *Organized Village of Kake*, 369 U.S. 60, 82 S.Ct. 562 (1962), this Court also stated that: " . . . Congress has to a substantial degree opened the doors of reservations to state laws. . . . ". It is difficult to reconcile the decisions of the lower courts herein, which have failed to enforce state laws against the egregious acts of a corporate entity committed both on and off the reservation. This is particularly true given the fact that Indian tribes are "domestic dependant nations". *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831) not superior sovereigns.

In *Oklahoma Tax Commission v. Chickasaw Nation*, ___U.S. ___, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) this Court

determined that the rule that Indians and Indian tribes are generally immune from state taxation, does not operate *outside* "Indian country". While *Chickasaw Nation* is a state taxation case, in *Bryan v. Itasca County*, 426 U.S. 373, 383, 96 S.Ct. 2102, 2108 (1976), the Court, (commenting on Public Law 280, 28 U.S.C. § 1360[1]) indicated that civil contract and tort laws, (like those Petitioner is relying upon for protection herein) are even less intrusive to tribal interests than state taxation laws. Therefore, it follows, that tribal sovereign immunity should not operate outside the reservation to deprive Petitioner of her constitutional day in court, due process, as well as the equal protection of non-discriminatory civil laws provided by U.S. CONST. art. VII and U.S. CONST. amend. XIV, § 1.

In the instant case, the Minnesota Supreme Court has contradicted the teachings of *Mescalero* and has misapplied the non-discriminatory state corporate statutes, in a manner which creates super-sovereign business corporations. In realizing this unconscionable and unconstitutional result, the Minnesota Supreme Court itself stated in its opinion:

> While the time may well come, or even be upon us now, that a tribal owned corporation, operated for profit as is LSI, should as a matter of fairness and equity be subject to the same liabilities as a non-tribally owned corporation, it is not for this court to make that decision in the absence of some change in Congressional policy or *direction from the U.S. Supreme Court* indicating that under such circumstances elimination of the tribal corporation's sovereign immunity is appropriate. (emphasis added).

Gavle v. Little Six, Inc., 555 N.W.2d 284, 296 (Minn. 1996). (App. 26). Based upon the foregoing, Petitioner now asks this

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[1] Public Law 280 provides civil jurisdiction to Minnesota courts, even on reservation lands. The issue still remains confused at best, as to whether Public Law 280 would provide a waiver of immunity as it relates to a for-profit business corporation, separate and distinct from the tribal government.

Court to provide the necessary direction to the lower courts to avoid the blatant unfairness, inequity and inconsistencies created by the decisions below. In *Puyallup Tribe, Inc. v. State of Washington*, 433 U.S.165, 97 S.Ct. 2616, 53 L.Ed.2d. 667 (1977) Justice Blackmun concurring stated:

> I entertain doubts, however, about continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940). I am of the view that doctrine may well merit re-examination in an appropriate case.

Puyallup Tribe, Inc., 433 U.S. at 178-79, 97 S.Ct. at 2624. (Blackmun, J., concurring). Petitioner's case is precisely the type of case demanding re-examination of the application of tribal sovereign immunity that Justice Blackmun must have been referring to in *Puyallup Tribe*. Justice Stevens more recently stated: "The doctrine of sovereign immunity is founded upon an anachronistic fiction. See *Nevada v. Hall*, 440 U.S. 410, 414-416 (1979). In my opinion all Governments – federal, state, *and tribal* – should generally be held accountable for their illegal conduct."(emphasis added). *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 514, 111 S.Ct. 905, 912 (1991) (Stevens, J. concurring). The lower court's decision carries this "anachronistic fiction" to a ridiculous extreme.

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 408 FN2 (Minn. App. 1995) (Randall, J. dissenting), citing, Oliver Wendell Holmes, *Path of the Law*, 10 Harv. L.R. 457, 469 (1897). The most important and critical consideration here is that if Respondent is not the *tribe* or arm of the tribal government (as determined by the Minnesota

Court of Appeals[2]), then arguments pertaining to the defense of *tribal* sovereign immunity are simply irrelevant. Chief Justice Keith of the Minnesota Supreme Court in his dissenting opinion below correctly noted:

> However, this does not change the fact that LSI is a private corporation, registered to transact business in the State of Minnesota like any other private business, and certainly not an extension of the tribal government per se. Furthermore, LSI was not incorporated under Section 17 of the Indian Reorganization Act, which extends sovereign immunity to corporations formed by tribal governments to further the tribe's economic interests. See 25 U.S.C. ¶¶ 476, 477 (1994). . . . As the Court of Appeals found, LSI "was created as a separate economic entity, not subject to governmental control, incorporated under tribal law and not merely as an authorized tribal activity." *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995).

Gavle v. Little Six, Inc., 555 N.W.2d 284, 299 (Minn. 1996) (Keith, C.J, Dissenting) (App. 33-34). Based upon the foregoing, the lower courts have clearly departed from the teachings of this Court in cases ranging from *Cherokee Nation* to *Mescalero*.

2. The Foreign Sovereigns Act of 1976.

Within the question as to whether tribal sovereign immunity can be applied to off-reservation business activity, an issue is presented which has never been determined by this Court. It is an important issue which is growing on a daily basis due to the success, rapid expansion and diversification of tribal related businesses both on and off reservations. The Foreign Sovereigns Act of 1976 implemented a restrictive view of sovereign immunity for foreign sovereigns. The relevant provisions of 28 U.S.C. § 1605 (a) read as follows:

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[2] *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995). (App. 47-48)

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> > (2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere. . . .

The definition of "foreign state" found in 28 U.S.C. § 1603 (b), includes an agency or instrumentality of a foreign state, which includes any entity which is a separate legal person, *corporate* or otherwise. . . . " (emphasis added.) There is no specific exception for sovereign Indian tribes or corporations owned by Indians under the Act. Native American tribes have a common-law immunity from suit similar to that accorded sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). However, Indian tribes are dependant and subservient sovereigns, existing only at the sufferance of Congress and are subject to complete defeasance. *States v. Wheeler*, 435 U.S. 313, 323 (1978). In this setting, the application of the Foreign Sovereigns Act of 1976 to off-reservation (or on reservation) business activity is unresolved.

Petitioner argued below, that the Foreign Sovereign Immunities Act of 1976, as an act of Congress, invalidated sovereign immunity for *all* business operations conducting business in the United States. In the face of the Foreign Sovereign Immunities Act of 1976, how is it that any tribe or tribal corporation can enjoy total super-sovereign powers for their off-reservation business activities in the United States, when true international sovereigns having more true sovereignty, have no such defense. The Minnesota Supreme court failed to address this issue. It is clearly contrary to the intent of Congress to allow immunity for business operations in the United States, whether they originate from Sweden, South Korea or a Sioux tribe.

Furthermore, given the fact that actions are allowed against foreign nations, the federal government, state governments and local governments; the decision below leads to an unconscionable and unintended result. If the lower court's decision is allowed to stand, Respondent corporation, and those businesses similarly situated, are exalted to the position of being the only business entities in the entire world that can totally avoid legal responsibility and liability for their business activities in the United States. There is simply no legal or equitable authority which allows such a ridiculous and unintended result. This was precisely the concern raised by Justice Stevens, concurring in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991), when he remarked that he was "not sure that the rule of tribal sovereign immunity extends to cases arising from the tribe's conduct of commercial activities off the reservation." 498 U.S. at 514, 11 S.Ct. at 912 (citing the Foreign Sovereign Immunities Act).

In the case of *In Re Greene*, 980 F.2d 590 (9th Cir. 1992), the Ninth Circuit Court of Appeals mentioned the Foreign Sovereign Immunities Act in passing, but never directly discussed whether the statute actually applied to tribes or corporations owned by tribes conducting business in the United States. *Id.* at 594. The court in *In Re Greene* commented that Congressional silence on the issue was instructive. However, despite the view expressed in *In Re Greene*, Congress knows how to except out Native American tribes from statutory provisions when it wants to do so. See, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994). (Indian *tribes* expressly excluded from definition of "employer".)[3] Based

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[3] The constitutionality of applying civil rights legislation on a piecemeal basis is subject to attack. Particularly, when the same legislation presumably applies to and protects all citizens of the United States, regardless of race. If the statute is truly designed to promote color-blindness, then why do we build in an exception that only sees the color red. See *Cohen v. Little Six*, 543 N.W.2d 376, 395 (Minn. App. 1995) (Randall, J. dissenting). Would we openly allow exceptions to Title VII for "caucasian", "black" or "asian" employers? Or conversely, would we

upon the foregoing, the Foreign Sovereign Immunities Act clearly is applicable to tribal related corporations which conduct business in the United States, whether on or off the reservation. The issue here appears ripe for determination by this Court.

3. The Interests of State of Minnesota:

This Court has often utilized balancing tests to analyze cases involving Native American issues. In the instant case, the State of Minnesota has a valid and overriding interest in protecting its citizens from the conduct of unscrupulous foreign corporations operating in the State. The State of Minnesota also constitutionally guarantees the right to have a jury trial in a Minnesota state court. See MINN. CONST. art I, § 4 (stating "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy"). The Minnesota Constitution also provides that:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

MINN. CONST. art I, § 8. In the instant case, Petitioner Gavle seeks to enforce basic human rights protected under the U.S. Constitution, Minnesota Constitution, state human rights provisions, common law tort theories, contract law, employment law and other laws (including federal and state statutes) designed specifically to protect the safety and well-being of

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openly legislate that Indians or Indian tribes have no protection under Title VII? Furthermore, the argument that Indian tribes are political entities and not racial groups is contrary to fact. In order to be recognized as a member of any particular tribe, you must establish proper ancestry and blood quantum. This is clearly not equal protection, and is indicative of the ridiculous extremes to which tribal sovereign immunity has been stretched.

female employees and other minorities in the State of Minnesota. A non-tribal business corporation, operating off of the reservation, should have no sovereign immunity to assert, and we urge this Court to rule accordingly.

Under the two-stage balancing test of *Rice v. Rehner*, 463 U.S. 713, 720, 103 S.Ct. 3291, 3296, 77 L.Ed.2d 961 (1983), the State of Minnesota has a much stronger interest in insuring the protection of basic human rights for all citizens and in prohibiting law abiding business practices within the state. Clearly, Respondent can not argue that enforcing human rights statutes that promote racial equality would be inconsistent with their traditions or beliefs.

Justice Coyne of the Minnesota Supreme Court also strongly dissenting in the decision below, put it quite succinctly when she stated that:

> Gavle complains of violation of the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1994). The requirements of the Minnesota Human Rights Act are applicable to the state and its political subdivisions as well as private employers, and I can see *no earthly reason* for permitting a foreign corporation to depart the Shakopee Mdewakanton Sioux (Dakota) reservation and to violate with impunity the human rights of Minnesota citizens while transacting business in Minnesota. (emphasis added).

Gavle v. Little Six, Inc., 555 N.W.2d 284, 300 (Minn. 1996) (Coyne, J, dissenting) (App. 36-37). The lower courts have impermissibly converted the limited subservient sovereignty established for Indian *tribes*, on their own lands, into super-sovereignty for multi-million dollar casino *conglomerates*, providing the same with total immunity, whenever and wherever they enter the mainstream of commerce. This result is directly contrary to *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) wherein this court said "[w]e do not read the [language] as conferring super-sovereign authority to interfere with another jurisdiction's sovereign rights." *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct.at 2224. The overriding interests of the

State of Minnesota in protecting its citizens should be controlling in the instant case.

The decision of the lower court must be reversed to insure conformity with this Court's prior decisions.

B. The Courts of Appeals and State Courts Are Irreconcilably Split On Whether The Sovereign Immunity Defense Applies to Off-Reservation Business Activities.

The results of the opinion below are even more unconscionable given the undisputed fact that Little Six, Inc. voluntarily and of its own desire, agreed to be bound by the laws of the State of Minnesota and "irrevocably" consented to be sued in Minnesota courts. The Respondent executed written documents for purposes of obtaining a license to conduct business in Minnesota pursuant to the Minnesota Foreign Corporations Act Minn. Stat. § 303.01 et seq. (see App. 63-64).

One of the best discussions of the clearly unsettled nature of this issue, is found in the concurring opinion of Justice Rymer in *In Re Greene*, 980 F.2d 590 (9th Cir. 1992) in which he said:

> . . . state supreme courts have addressed the commercial exception, but with ambiguous results. See e.g., *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104, 1109 (1989) (tribal sovereign immunity covers "tribal business" but not "non-tribal business," without definition); *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845, 850 (1988) (tribal sovereign immunity does not cover economic activities by the tribe off the reservation), cert. denied, 490 U.S. 1029, 1030, 109 S.Ct. 1767, 1768, 104 L.Ed.2d 202 (1989). See also *Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377, 382 (Minn. 1979) ("Generally, state courts may assume jurisdiction over disputes arising from commercial transactions between Indians and non-Indians if the transaction is not confined to the Indian Reservation."); *Atkinson v. Haldane*, 569

> P.2d 151, 169-70 (Alaska 1977) (courts do not recognize "proprietary act/governmental function" test regarding tribal sovereign immunity); *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 92 Wash.2d 236, 595 P.2d 938, 939, 942-43 (no commercial exception under existing law, but concurring justice suggests this rule is "unjust, unwise and unreasonable") (1979).
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> Although the United States Supreme Court has held that "without Congressional authorization the Indian nations are exempt from suit," *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940); see *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S.Ct. at 1677 (quoting *United States Fidelity & Guaranty*, 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940)), *it has never directly considered the reach of tribal immunity in business ventures*. Indeed Justice White dissented from the denial of certiorari in *Padilla*, 490 U.S. at 1030, 109 S.Ct. at 1768, urging that the Court should have heard the case "to resolve the conflict among state courts"; Justice Stevens, concurring in *Potawatomi Tribe*, remarked that he was "not sure that the rule of tribal sovereign immunity extends to cases arising from the tribe's conduct of commercial activities off the reservation." Id. 498 U.S. at ___, 11 S.Ct. at 912 (citing the Foreign Sovereign Immunities Act).

Id. at 900.

In the *Greene* case, the Ninth Circuit considered the sovereign immunity of a furniture business that was a "wholly-owned and managed enterprise of" the tribe therein. Unlike the facts of the instant case, the tribe had not created a separate and distinct corporation to operate its business. Based upon these facts, the court in the *Greene* case, upheld the tribal sovereign immunity defense.

Two lower courts clearly have considered similar issues regarding the tribal sovereign immunity defense raised by a corporate entity not formed under Section 17 of the Indian

Reorganization Act, (25 U.S.C. § 477) such as Respondent in the instant case. The two cases are *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) and *Dixon v. Picopa Construction Company*, 772 P.2d 1104 (Ariz. 1989).

In *Padilla*, the New Mexico Supreme Court considered the application of sovereign immunity to the "Pueblo of Acoma d/b/a Sky City Contractors" an *unincorporated* association that registered to do business in New Mexico and which was conducting business in the mainstream of commerce. Sky City Contractors, when sued for beach of contract, raised a sovereign immunity defense and the court struck it down. The *Padilla* court said:

> The United States Supreme Court has held that the doctrine that 'no sovereign may be sued in its own courts without its consent' does not necessarily support a claim of immunity in another sovereign's courts. *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed. 416 (1979), aff'g *Hall v. University of Nevada*, 74 Cal. App.3d 280, 141 Cal.Rptr. 439 (1977) (Hall II). For reasons well articulated in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975), the doctrine of sovereign immunity does not find favor in the common law of this state. . . . Having found no provision under the supreme law of the land that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct, we believe the exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct is solely a matter of comity.

Padilla, 754 P.2d at 850. The facts of the instant case are even more favorable to Petitioner than those in *Padilla*, because Respondent Little Six, Inc. is a separate *incorporated* entity not formed under Section 17 of the Indian Reorganization Act, and it additionally registered to transact business in Minnesota pursuant to Minnesota Foreign Corporations Act.

Dixon v. Picopa Construction Company, 772 P.2d 1104 (Ariz. 1989) is a case which is close to being "on all fours" with the instant case. In *Dixon*, the Arizona Supreme Court

considered the application of the sovereign immunity defense to the "Picopa Construction Company" which was a separate corporation formed under an ordinance passed by the Salt River Pima-Maricopa Indian Community. The facts of the instant case are even more favorable to Petitioner than those in *Dixon*, because, unlike Little Six, Inc. herein, Picopa Construction Company did not register with the Arizona Corporation Commission and did not appoint an agent for service of process in the state. *Dixon*, 772 P.2d at 1106. The *Dixon* court held that Picopa Construction Company was not entitled to assert sovereign immunity. The Arizona Supreme Court explained:

> Congress's provision for allowing Indian tribe's to segregate themselves into governmental and commercial corporate units, . . . arguably implies that "Congress did not intend all commercial activity" undertaken by Indian entities be immune from suit. Thus Congress itself recognized that immunity may have deleterious effects on a tribe's economic development. The court of appeals held that the mere act of incorporation did not waive tribal immunity. Although that statement is correct, in this instance it overlooks the real issue. The waiver issue does not arise until Picopa first establishes that it has immunity to waive. We hold that Picopa is not a subordinate economic organization within the meaning of White Mountain Apache[4] and S. Unique[5], and hence may not assert immunity. *Further, on this record, as a separate corporate entity, Picopa is not entitled to assert immunity in its own right for its off-reservation commercial activities.* (emphasis added) (citations omitted).

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[4] Referring to *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971).

[5] Referring to *S. Unique v. Gila River Pima Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376) (Ariz. Ct. App. 1983), rev. denied (1984).

Dixon, 772 P.2d at 1111-1112. The analysis of the *Dixon* case is justifiable and sound under the facts of that case, as well as the parallel yet more persuasive facts of the instant case. Thus, the Minnesota courts decisions are at odds with *Dixon* and *Padilla*, as they allow Respondent to successfully assert the defense of *tribal* sovereign immunity for off-reservation business activity. Recognizing this, Chief Justice Keith in his dissenting opinion stated:

> Like LSI, the Picopa Construction Company involved in the *Dixon* case had a board of directors separate from the tribal government and with exclusive administration control of the corporations day-to-day operations, was instituted as a for-profit business venture with the Community as the sole shareholder, was not organized under Section 17 of the Indian Reorganization Act, and was not intended to carry out the Community's governmental functions. Id. at 1107-11. I would follow the Arizona court's in *Dixon* and *Shelley*[6], and require that a business incorporated under tribal law show itself to be an extension of the tribal government in order to take advantage of the tribe's sovereign immunity defense. In this case, it is clear that LSI does not meet this test.

Gavle v. Little Six, Inc., 555 N.W.2d 284, 300 (Minn. 1996) (Keith, C.J., dissenting) (App. 35).

The foregoing cases, including Justice White's recognition of the clear conflict among state courts, (*See*, *Padilla*, 490 U.S. at 1030, 109 S.Ct. at 1768) all arose before the creation of the entire Indian gaming industry resulting from the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.

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[6] *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971).

§§ 2701-2721 (1988)[7]. We have witnessed the mass proliferation of tribal casino gambling operations throughout the United States in the 1990's. Current estimates are that there are now over 250 Indian gambling casino operations in the United States. The number and size of these Indian gambling casino's are quickly expanding. Many have become destination resorts with the construction of large hotels, restaurants, shops and entertainment forums. This economic explosion has also resulted in the diversification of the business interests of tribes and tribal corporations, including the acquisition of off-reservation businesses operating in the main stream of commerce in the United States. Respondent, Little Six itself owned and operated a construction company in North Dakota and a supply company in Minnesota.

The undeniable corollary of this proliferation is that, compared to 1989 when Justice White urged the Court to hear *Padilla* "to resolve the conflict among state courts", there are hundreds of thousands more United States citizens who today, visit, patronize and are employed by Native American owned businesses both on and off reservation lands. The relatively minor conflicts that existed in 1989, have expanded and have continued to grow at an exponential rate along with the multi-billion dollar Indian gambling industry across the nation.

The practical and devastating impact of the Minnesota court's decision in this case is to allow off-reservation business to be conducted in the State of Minnesota (or anywhere else) with total immunity! The law must be clarified and harmonized to provide for fair and equitable remedies for

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[7] The Minnesota Supreme Court incorrectly held that all Indian gaming is conducted pursuant to the IGRA and that as a matter of federal law, Respondent must be a tribal entity in order to conduct gaming authorized by statute. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 295 (Minn. 1996). (App. 23). However, this analysis is in error. While it may be that only tribes can own tribal casinos, non-tribal corporations may be hired to manage the operations for the tribe, and individual ownership of Class III gaming may be allowed. See 25 U.S.C.§ 2711(3) and 25 CFR § 522, § 522.10. Respondent was managing the casino in the instant case and also had other operations beyond managing the casino.

employer and patrons. Tribal members and non-tribal members alike, who are employed by, or knowingly or *unknowingly*[8], conduct business with Indian owned businesses, particularly off the reservation, should not be denied a remedy at law. The decision below creates an unnecessarily and irresponsibly dangerous business atmosphere for the conduct of Indian owned businesses. Abuses will continue to be perpetrated with impunity, unless laws are applied uniformly to all employers. The court in *Namekagon Development Company, Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23, 28 (D. Minn. 1974) addressed the issue in these terms:

> To dismiss this suit against the local housing authority on grounds of sovereign immunity would be grossly unfair. . . . It invited outsiders to do business with it . . . 'It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all of the rights and advantages of a trading corporation in the ability to sue and yet itself be immune from suit and be able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right . . . ' [citation omitted].

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[8] Petitioner was a 23 year old college student looking for part time work, while she put herself through college. She went to work as an hourly security guard for Little Six, Inc., which, from all appearances was just another corporate employer. Little Six, Inc. advertised itself in the newspaper as "one of the fastest growing businesses in Minnesota." (App. 74). Mystic Lake Casino was also represented as "a division of Little Six, Inc." No mention was made of sovereign tribal status. It is unreasonable to expect her, as an hourly employee, without union or other support, to understand the nuances of tribal sovereign immunity, realize the extent of her protection under the law (or lack thereof), and negotiate appropriate protection. Generally, the hundreds of thousands of individuals across the country in a position like Petitioner's, do not have the understanding or the bargaining power to protect themselves. Petitioner, did not know she was going to work for an employer who was not bound by any of the laws that we have all fought long and hard to realize.

See also, *Duluth Lumber v. Delta Development, Inc.*, 281 N.W.2d 377, 383 (Minn. 1979).

It is socially, economically and legally repugnant to unnecessarily allow such conditions to continue unabated in the United States, as if they were occurring in some remote part of the world beyond the reach of our long standing notions of democracy.

C. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Requirements Needed To Establish A Waiver Of The Tribal Sovereign Immunity Defense.

The lower court's decision contradicts controlling precedent regarding the validity of waivers of tribal sovereign immunity. Native American tribes have a common-law immunity from suit similar to that accorded sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). This immunity bars suits against Native American communities absent a clear waiver of immunity by the community or by congressional act. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara*, 436 U.S. at 58, 98 S.Ct. at 1677. *Blacks Law Dictionary*, 1370 (5th ed. 1979), defines "unequivocal" as "clear; plain; capable of being understood in only one way, or as clearly demonstrated. Free from uncertainty, or without doubt. . . . " The Eighth Circuit recently found a waiver in an arbitration clause. The Eighth Circuit reiterated that the:

> Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of '**magic words**' stating that the tribe hereby waives its sovereign immunity."(emphasis added).

Rosebud Sioux Tribe v. Val-U Constr. Co., 50 F.3d 560 (8th Cir.1995), *reh'g denied* (April 21, 1995) *cert. denied*, 116 S.Ct.78 (1995). Following the teachings of *Santa Clara* some

courts have indicated that an appropriate analysis requires looking for an affirmative textual waiver of immunity. *Pan American Co. v. Sycuan Band*, 884 F.2d 416, 419 (9th Cir. 1989). Other lower courts have followed *Santa Clara*, in finding that there are many ways in which a tribe may waive the sovereign immunity defense. Minnesota Courts have previously recognized that "[o]ne of the ways a tribe can waive its sovereign immunity is by including a 'sue and be sued' clause in a relevant document." (emphasis added). *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156,158 (Minn. App.1992), citing *Fontanelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970). A "sue and be sued" clause is nothing more than an expression that the entity has consented to be sued. In the instant case, the written consent to be sued is "irrevocable" and is contained on the face of the voluntary application filed with the State of Minnesota by Respondent. (App. 64).

In the instant case, the Minnesota court acknowledged *Santa Clara* and *Rosebud Sioux*, and reiterated the rule that no magic words are required. It then proceeded to comment, "no words exist, magic or otherwise, that articulate the kind of clear abandonment of this powerful affirmative defense mandated by the Supreme Court". *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 297 (Minn. 1996) (App. 28). The Minnesota Supreme Court has impermissibly raised the standard set forth in *Santa Clara*, and made it impossible to find a waiver unless those "magic words", "the tribe hereby waives its sovereign immunity" are actually written. Indeed, the Minnesota Supreme Court said "[w]e have no 'sue and be sued' clause before us. . . . " *Gavle v. Little Six, Inc.*, 555 N.W. at 297. (App. 29).

The instant decision incorrectly limits valid waivers to the exact language contained in the "sue and be sued" clauses discussed in *Duluth Lumber v. Delta Dev., Inc.*, 281 N.W.2d 377 (Minn. 1979) (court held that tribe purposely waived immunity by enacting ordinance that provided for suits by and against business entity); and *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156 (Minn. App. 1992) (court held that tribe could be sued and that sovereign immunity was waived

by sue and be sued language in corporate charter). The lower court inexplicably discounts the explicit language found on the face of Respondent's *voluntary application* filed by its Board of Directors under Minn. Stat. § 303 (the "Application") which declares under penalties of perjury that "**The corporation *irrevocably consents to service of process* on it as provided by Minnesota Statute 303.13 or any amendment or successor thereto**". (App. 64). The applicable statutory definition of "process" includes "the summons in a civil action, and any process which may be issued in any action or proceeding in any court." Minn. Stat. § 303.02, Subd. 6. By obtaining authority to transact business in Minnesota, Respondent received a "Certificate", (App. 65) which became prima facia evidence of the matters contained on its face. Minn. Stat. § 303.23, Subd. 1. Respondent also agreed in writing to be bound by the laws of the State of Minnesota. Minn.Stat.§ 303.09. This can only be one thing, a consent to be sued in Minnesota courts, particularly, where the lower court had already determined that it had subject matter jurisdiction over the dispute. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292 (Minn. 1996) (App. 15-16). The clear language on the face of the Application is a consent to be sued, and thus, the requisite textual waiver of sovereign immunity by Respondent corporation. The Application language here is clear; plain; capable of being understood in only one way, and is free from uncertainty or doubt.

The written "*irrevocable* consent to service of process" found in the Application is the type of unequivocal expression required under *Santa Clara Pueblo*. The lower courts departed from *Santa Clara Pueblo* when they found that the Respondent's irrevocable consent to receive the summons in a civil action, and consent to participate in any process which may be issued in any action or proceeding in any court, was not an unequivocal consent to be sued. All the pertinent facts pertaining to the waiver and consent were clearly set forth in writing.

The primary focus and intent of the Minnesota Foreign Corporations Act and other similar state statutes is to make a foreign corporation suable and accountable in local courts for

disputes arising from their business activities in the state. The particular statutory language, form documents and filing requirements are all specifically designed to accomplish this result. Many courts, including this Court, recognized this fact long ago. The decision of the lower court also contradicts the line of cases that have grown out of *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed 167 (1939). "The whole purpose of requiring designation of an agent for service is to make a non-resident *suable in the local courts*." (emphasis added). *Doula v. United Technologies Corporation*, 759 F. Supp. 1377, 1382 (D. Minn. 1991). This matter is so well settled that the Eighth Circuit Court of Appeals stated the following:

> Appointment of a registered agent for service of process is not one of the specific types of *consent* listed by the Supreme Court in the cited case[9], but it is nevertheless a traditionally recognized and well-accepted species of general consent, possibly omitted from the Supreme Court's list *because it is of such long standing as to be taken for granted.* (emphasis added).

Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1999 (8th Cir. 1990).

> Moreover, the designation by a foreign corporation, in conformity with a valid State statute and as a condition of doing business within the state, of an agent upon whom service of process may be made, *is an effective consent to be sued in the courts of that state.* (emphasis added).

Beales v. L. D. Shreiber & Co., 56 F.Supp. 814, 815 (D. Minn. 1944), citing *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed 167 (1939). Furthermore, a designation of an agent for service of process is "a voluntary act." *Neirbo*, 308 U.S. at 174. The cases of *Rykoff-Sexton, Inc. v. American Appraisal Associates, Inc.*, 469

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[9] i.e. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

N.W.2d 88, 90 (Minn. 1991); *Knowlton v. Allied Van Lines*, 900 F.2d 1196, 1200 (8th Cir. 1990); *Ytuarte v. Gruner + Jahr Printing and Publishing Co.*, 935 F.2d 971 (8th Cir. 1991) and *Doula v. United Technologies Corporation*, 759 F. Supp. 1377, 1382 (D. Minn. 1991) establish a well-settled principle that appointing an agent for service of process under Minn. Stat § 303.01 et seq. not only provides for jurisdiction in Minnesota Courts (as the lower courts recognized), but also constitutes a *consent to be sued* in Minnesota courts. The Minnesota Supreme Court stated in 1915 that:

> It is reasonable that a foreign corporation, keeping and maintaining agents in the state for procuring business for its benefit and profit, should *answer* in this forum to a citizen of this state for a breach of contract or duty arising out of business so procured. . . . (emphasis added).

W.J. Armstrong Co. v. New York Cent. & H.R.R. Co.,129 Minn. 104, 111, 151 N.W. 917, 919 (1915). This statement is as true today as it was 80 years ago.

The lower court clearly departed from the *Santa Clara Pueblo* and *Neirbo* line of cases, when it refused to recognize a plain and simple consent to be sued, and thus, a waiver of *tribal* sovereign immunity clearly present in the instant case.

D. The Courts of Appeals and State Courts Are Irreconcilably Split On What Is Required To Establish A Waiver Of The Tribal Sovereign Immunity Defense.

In the instant case, the lower courts have decided that a waiver of sovereign immunity hinges upon whether or not a standard "sue and be sued" clause exists. The Minnesota Supreme Court's explanation of their decision as follows, is equally erroneous:

> Quite simply, consent to service of process, and thus to personal jurisdiction, cannot be construed as an automatic waiver of an otherwise available affirmative defense. Presumably foreign corporations that register to do business in Minnesota do not

> understand that they are waiving their right to assert affirmative defenses, based, for example upon a statute of limitations, failure of consideration, accord and satisfaction and the like. Similarly, we conclude that LSI, by agreeing to service of process, cannot be said to have waived the affirmative defense of sovereign immunity.

In the instant case, Little Six, Inc. consented to be sued in Minnesota courts through a written filing that expressly stated that the corporation irrevocably consented to service of process. By operation of law and plain common sense, it waived all *jurisdictional defenses*, including the jurisdictional defense of tribal sovereign immunity.

It is clear that many forms of waivers have been readily recognized by other courts. For example, courts have held that a tribe's agreement to an arbitration clause constitutes a valid waiver of the immunity defense. See *Hydaburg Cooperative Association v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992); and *Nenana Fuel Co., Inc. v. Native Village of Venetie*, 834 P.2d 1229, 1233 (Alaska, 1992). In the *Hydaburg* case the court stated: "[a]n arbitration clause in an agreement executed by an Indian tribe would be meaningless if it did not constitute a waiver of the tribe's immunity from suit to compel arbitration or to enforce an arbitration award." *Hydaburg*, 826 P.2d at 755.

Like the decision in *Hydaburg*, the consent to service process herein, would be a meaningless act if it did not constitute a waiver of the jurisdictional based sovereign immunity defense. A waiver may also be found in any evidence that shows intent that is inconsistent with the notion of tribal sovereign immunity. The court in *Nenana Fuel* stated:

> In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), we held that a tribe waives its sovereign immunity by agreeing to contract terms *inconsistent with sovereign immunity*. Eyak had entered into a contract with GC Contractors under which GC Contractors was to build a community center for Eyak. Pursuant to an arbitration

> clause in the contract, the parties submitted to arbitration a dispute concerning Eyak's failure to pay money due under the contract. The arbitrator awarded GC Contractors the full sum sought and rejected Eyak's argument that it would not be bound by any arbitration decision on the grounds of sovereign immunity. Adhering to the general rule that all provisions in a contract should be found meaningful, we affirmed the superior court's confirmation of the arbitration award.

Nenana Fuel, 834 P.2d at 1232. Based upon *Santa Clara Pueblo, Rosebud Sioux, Nenana Fuel, Native Village of Eyak, Hydaburg, Duluth Lumber, McCarthy, Dacotah Properties* and many other similar cases, Respondent's Application must constitute a waiver of sovereign immunity, as the language is as clear and definite as that found in any "sue and be sued" clause or "arbitration" clause.

In *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985) the Eighth Circuit set out examples of when tribal sovereign immunity has been waived. The *American Indian Agricultural Credit Consortium*, court stated:

> Tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish. (See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980) affirmed on other grounds, 455 U.S. 130, 102 Supreme Court 894, 1982) (Tribal Council Tax Ordinance expressly provides the tribe consents to suit in tribal or federal court); *Mekagon Development Company v. Bois Forte Reservation Housing Authority*, 517 F.2d 509 (Tribal Council Ordinance establishing housing authority provides: "The Council hereby gives its irrevocable consent to allowing authority to sue or be sued in its corporate name upon any contract, claim or obligation arising out of its activities . . . "); *Fontanelle v. Omaha Tribe of Nebraska*, 430 F.2d at 147 (Tribal Corporate Charter authorizes it to "sue or be sued in courts of competent

> jurisdiction"); *Maryland Casualty Company v. Citizens National Bank*, 361 F.2d 517 (5th Cir. 1966) (Tribal Constitution authorizes the tribe to "sue or be sued" but bars attachment of tribal property). . . .

American Indian Agricultural Credit Consortium, 780 F.2d at 1379.

The unsettling problem created by the lower courts decision herein, is that if, as the lower court claims, that "irrevocably" consenting to service of process does not result in the waiver of the sovereign immunity defense because *affirmative defenses are retained* by the corporation or the tribe, then, virtually all of the other state and federal court of appeals cases cited above would need to be overturned for the same rationale. Under a "sue and be sued" clause waiver like that found in numerous cases like *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156 (Minn. App. 1992), and *Fontanelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970), the tribe would still have all of its affirmative defenses, including tribal sovereign immunity. Under an "arbitration clause" waiver like the one found in numerous cases like *Hydaburg Cooperative Association v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992), and *Nenana Fuel Co., Inc. v. Native Village of Venetie*, 834 P.2d 1229, 1233 (Alaska, 1992), the tribe would still retain all of its affirmative defenses and could successfully assert sovereign immunity within the arbitration proceeding. The decision of the Minnesota Supreme Court below cannot be reconciled with scores of long-standing cases recognizing the various forms that a waiver of immunity may take, other than the "magic words", "the tribe hereby waives its sovereign immunity." *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir.1995), *reh'g denied* (April 21, 1995) *cert. denied*, 116 S.Ct.78 (1995).

The Minnesota Supreme Court's reliance on *Ransom v. St. Regis Mohawk Education and Comm. Fund, Inc*, 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995) is misplaced, confusing and further accentuates the irreconcilable split among the lower courts. The Minnesota Supreme Court first determined that it in fact had personal and subject matter

jurisdiction in the instant case. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292 (Minn. 1996). (App. 15-16). However, in discussing Respondent's Application and Certificate of Authority to Transact Business in Minnesota (App. 63-65), it cited *Ransom* for the following:

> the mere fact that a tribal corporation, by statute, has designated an agent for service of process or is empowered to 'sue and be sued' does not automatically subject that corporate entity to any court's jurisdiction *where jurisdiction is otherwise lacking*. (emphasis added).

See *Gavle v. Little Six, Inc.*, 555 N.W.2d at 297. (App. 29). In *Ransom*, there was no written Application whereby the corporation "irrevocably consented to service of process" in New York courts. For purposes of refusing to find a waiver, the Minnesota Supreme Court went on to say "[w]e agree with this analysis" *Id.* The flawed logic is evident. The *Ransom* case turned upon the fact that the New York Court of Appeals could not find that it had jurisdiction based upon the New York statute. Here, the Minnesota court had already determined that it had jurisdiction over this matter before it even discussed waiver and the *Ransom* case. Once the Minnesota Supreme Court found that it had jurisdiction, *Ransom* became irrelevant to the waiver analysis.

CONCLUSION

Laws and doctrines are not made and enforced in historical and political vacuums. The protection allowed the Indian tribes under the doctrine of sovereign immunity arose during a very different day and age. This case must be looked at under the light of the modern day. It may be that tribal sovereign immunity has its valid place for the right reasons, including matters which are wholly internal to a tribe. This is not one of those cases. The "anachronistic fiction" of tribal sovereign immunity, with its origins based in racial segregation, should not operate to negate Petitioner's basic constitutional rights. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people

whose institutions are founded upon the doctrine of equality". *Hirabayashi v. United States*, 320 U.S. 81 (1943).

For the forgoing reasons, the Petition of Jill Gavle should be granted and a Writ of Certiorari issued to the Minnesota Supreme Court.

Dated: January 28, 1997

Respectfully submitted,

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APPENDIX A

STATE OF MINNESOTA

IN SUPREME COURT

CO-95-133

Court of Appeals Gardebring, J.
Dissenting, Keith, C.J. and Coyne, J.

Jill Gavle, petitioner,

Appellant,

vs.

Filed: October 31, 1996
Office of Appellate Courts

Little Six, Inc., a foreign corporation
d/b/a Mystic Lake Casino, et al.,

Respondents.

SYLLABUS

1. Although jurisdiction may be concurrent with that of a tribal court, state courts have subject matter jurisdiction over a cause of action involving a tribal-owned corporation and a nonmember when the alleged acts from which the cause of action arose occurred both within and outside of Indian country.

2. The affirmative defense of sovereign immunity may be extended from a tribe to a tribal business entity, if the business entity is organized for a governmental purpose and closely linked to the tribe and if the extension of immunity furthers federal policies intended to promote tribal autonomy.

3. Absent an express and unequivocal waiver of sovereign immunity, a tribal business entity possessing

the affirmative defense shall not be deemed to have waived it. Registration with the Secretary of State as a foreign corporation is not such a waiver.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

This case is a tort action filed by appellant Jill Gavle against Little Six, Inc. (LSI) and three of its officers. The suit alleged several tortious acts, including sexual harassment, pregnancy and racial discrimination, civil rights violations and other torts, arising from her employment with LSI. The trial court granted LSI's motion for summary judgment, holding that sovereign immunity barred Gavle's claims against LSI. The court of appeals affirmed, concluding that the trial court had both subject matter and personal jurisdiction over LSI, but agreeing with the trial court that sovereign immunity was a bar to the suit. We affirm on the basis that, while state courts may have concurrent jurisdiction with tribal courts in civil matters arising both in and outside of Indian country, the sovereign immunity of the Shakopee Mdewakanton Sioux (Dakota) Community extends to LSI and is a bar to this suit in a state court.

The Shakopee Mdewakanton Sioux (Dakota) Community (the Community) is a federally recognized Indian tribe. LSI, a tribal business entity incorporated under the Community corporate ordinance in 1991, has issued one

share of stock owned by all voting members of the Community. LSI is registered with the state of Minnesota as a foreign corporation transacting business within the state. LSI owns a gambling casino which is in Mdewakanton Indian Country.[1]

The Community has, through the corporate ordinance, granted certain privileges and protections to LSI:

> 4.11 A Corporation wholly owned by the Community may assume any or all of the Community's rights, privileges and immunities (including, without limitation, sovereign immunity) concerning federal, state or local * * * jurisdiction to the same extent that the Community would have such rights, privileges, and immunities if it engaged in the activities undertaken by the Corporation.
>
> 4.12 A corporation wholly owned by the Community, shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Community, and other courts of competent jurisdiction * * * .

Shakopee Mdewakanton Sioux Community Corporation Ordinance §§ 4.11, 4.12 (amended, July 27, 1994). In turn, LSI's articles of incorporation set out the purpose of the corporation and limit both the reach of immunity extended by the Community and the extent of the corporation's ability to consent to be sued:

> 3.0 Purposes and Powers. The purposes for which the Corporation is organized are to

---

[1] "Indian Country" includes land within Indian reservations, dependent Indian communities, and Indian allotments. 18 U.S.C. § 1151 (1994).

> engage in any lawful act or activity * * * [which seeks] to improve the business, financial or general welfare of the Corporation, the Members of the Corporation, and the Community.
>
> 3.1 Sovereign Immunity of Corporation. The Shakopee Mdewakanton Sioux Community confers on the corporation all of the Community's rights, privileges and immunities concerning federal, state and local * * * jurisdiction, and sovereign immunity from suit * * * . Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.
>
> 3.2 Consent to Sue and be Sued Required. The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction; * * * . Consent to suit by the Corporation shall in no way extend to the Community, nor shall a consent to suit by the Corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the Community.

Articles of Incorporation of Little Six, Inc. §§ 3.0, 3.1, 3.2 (Mar. 18, 1991) (hereinafter Articles of Incorporation).

LSI employed Gavle as a security guard from March 1992 to January 1993. Her job included duties at the casino (in Indian Country) and at LSI's temporary administrative offices at the Canterbury Downs complex in Shakoppe, Minnesota. While Gavle's complaint details many incidents, alleged to be tortious, that occurred at the casino, it also contends that some of the allegedly

tortious acts took place away from the casino, in or near Shakopee.[2]

At the heart of this case is the issue of whether tribal business entitles are subject to the application of state civil law in state court. To answer this question, we must analyze two related legal concepts – jurisdiction and sovereign immunity. Though it is sometimes said that state or federal courts are deprived of jurisdiction through the application of tribal sovereign immunity, the concept is more properly thought of as an affirmative defense, to be asserted by a tribe, tribal official or tribal entity as a bar to a particular lawsuit. Further, there are instances when a state or federal court may have jurisdiction over a matter involving a tribe or tribal entity, but may choose to stay its action, deferring to the concurrent jurisdiction of a tribal court. Thus, we must consider four related yet discrete issues:

a. Do Minnesota courts have jurisdiction over a tribal business entity in a civil tort matter involving actions occurring both within and outside of Indian country?

b. If Minnesota courts have such jurisdiction, must they stay their exercise of that jurisdiction in consideration of concurrent tribal court jurisdiction, under the doctrine of "infringement"?

c. If Minnesota courts have such jurisdiction and choose to exercise it, is such a suit nevertheless barred by tribal sovereign immunity?

---

[2] Gavle's allegations of injury involve actions by defendants Leonard Prescott, Allene Ross and William Johnson, corporate officers of LSI, but those individual claims are not at issue here.

d. If sovereign immunity would otherwise be available in this case, has it been waived by LSI's registration with Minnesota's Secretary of State as a foreign corporation?

Historical Background

To provide context for our discussion of these complex issues, we begin with some discussion of the historical relationship of Indian tribes to the state and federal governments. There are over 500 federally recognized tribes in the United States. David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 4 (3rd ed. 1993), Felix S. Cohen's commentary best describes the historical relationship between the United States and Indian tribes:

> Indian policy is marked by idealistic periods such as the first years of the Republic, when Congress pledged that 'the utmost good faith shall always be observed toward the Indian,' and the 1930's, when a commitment was made to revive tribal governments. Other eras were less altruistic: the period of removal, when hundreds of tribes were evicted forcibly from their ancestral lands; the allotment era, which resulted in the loss of ninety million acres of tribal lands; and the termination period, when more than one hundred tribes were stripped of the federal-tribal relationship and, in most cases, of their land.

Felix S. Cohen, *Handbook of Federal Indian Law* 49 (1982 ed.) (hereafter Cohen, *Federal Indian Law*).

In general, the federal government has viewed the Native American more as a "political entity" than as a

racial minority.[3] Thus, until 1871 the United States recognized Indian tribes as possessed of the attributes of nationhood and, accordingly, concluded treaty agreements with them. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305-06 (1902). For over one hundred years however, this country has systematically brought the various Indian tribes under the auspices of the federal government as "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In exchange for ceded land, the federal government gave Indian tribes special status that only Congress may remove. Indian tribes are not states; nevertheless, they possess a kind of sovereignty superior to that of states but inferior to that of the federal government. *Stephens v. Cherokee Nation*, 174 U.S. 445, 484-86 (1899); *see Colliflower v. Garland*, 342 F.2d 369, 374-76 (9th Cir. 1965). They are "subordinate and dependent nations possessed of all powers as such" and limited only "to the extent that they have expressly been required to surrender [their powers] by the superior sovereign, the United States." *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959). Thus federally recognized tribes hold certain powers and privileges allowed other sovereigns; jurisdiction over certain judicial matters and sovereign immunity are two such characteristics.

Jurisdiction

Judicial jurisdiction over matters involving Indians or Indian tribes is a function both of territory – where the

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[3] Getches, et al., *Federal Indian Law* at 8.

matters arise – and of subject matter – what the nature of the claim is. "A court's jurisdiction may depend not only on the location of events but also on the race of the parties or the subject matter of the case." Cohen, *Federal Indian Law, supra,* at 281. Given the pervasive sweep of federal law in Indian matters and the deference to Indian sovereignty within that law, jurisdiction of state courts over both civil and criminal matters involving Indians is governed by federal statute or case law. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832), the U.S. Supreme Court held that, absent federal action, Indian tribes are not subject to the jurisdiction asserted over them by a state. The Court reaffirmed this holding over 100 years later in *Bryan v. Itasca County Minnesota,* 426 U.S. 373, 392 (1976) (quoting *Oklahoma Tax Commission v. United States,* 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting)), when it said: "Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate * * * immunity and allow states to treat Indians as part of the general community." Thus, absent a grant of federal authority, state courts have no jurisdiction over Indians, Indian tribes or other Indian entities. *See, e.g., National Farmers Union Ins. Co. v. Crow Tribe of Indians of Montana,* 471 U.S. 845, 855-56 (1985); *Fisher v. District Court of the Sixteenth Judicial Dist. of Montana,* 424 U.S. 382, 387 (1976); *Williams v. Lee,* 358 U.S. 217, 220 (1959); *United States v. Kagama,* 118 U.S. 375, 384 (1886).

In some states, including Minnesota, Congress has provided for state court criminal jurisdiction for matters occurring within Indian country, 18 U.S.C. § 1162 (1994), and for civil jurisdiction in actions to which Indians are

parties. 28 U.S.C. § 1360 (1994). However, the reach of congressionally authorized state court jurisdiction provided in so-called Public Law 280[4] states does not extend to tribes entities. *See Bryan*, 426 U.S. at 389.

Jurisdiction over federally recognized tribes themselves, or tribal entities, is governed by federal case law. The U.S. Supreme Court has determined that state court jurisdiction over tribal activities that took place within Indian country would undermine the congressional aim of encouraging self-government and self-determination by the dependent tribes and "infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S. at 223. However, the Court found no such infringement where the tribal activities took place off the reservation. Specifically, the Court has said "[a]bsent express federal law to the contrary, [Indian business entities] going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). In those circumstances, the Court has held that state courts may have jurisdiction to hear the cause of action.

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[4] Public Law 280, now codified as 28 U.S.C. § 1360 (1994), identified six original states whose state courts would have jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in * * * Indian country * * *." This law was later modified by the law now codified as 25 U.S.C. § 1322 (1994) to give state courts jurisdiction over civil matters in Indian country "with the consent of the tribe." However, the original six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) all retained original civil jurisdiction even without the consent of the tribes.

This case is, of course, complicated by the fact that some of the alleged tortious acts took place within Indian country, while others did not. Since controlling federal common law turns largely on the location of the alleged tortious activity, it provides no clear guidance as to which court system may assert jurisdiction. Because this case involves non-Indian individuals and Indian tribal business entities and because it involves acts occurring both within Indian country and outside, it may be one of those cases where " 'both the tribe and the State could fairly claim an interest in asserting [our] respective jurisdictions.' " *Duluth Lumber and Plywood Co. v. Delta Development*, 281 N.W.2d 377, 382 n.3 (Minn. 1979) (quoting *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 179 (1973)).

Thus, in some respects, this jurisdictional puzzle is best considered as an issue of concurrent jurisdiction. Concurrent jurisdiction describes a situation where two or more tribunals are authorized to hear and dispose of a matter and the choice of which tribunal is up to the person bringing the matter to court. *Black's Law Dictionary* 291 (6th ed. 1990). Such a jurisdictional overlap is common between the federal and state courts as both courts are empowered to hear certain claims, such as those arising under 42 U.S.C. § 1983 (1994), *Allen v. McCurry*, 449 U.S. 90, 99-100 (1980), or the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2084 (1994), *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 697 (Minn. 1985), *cert. denied*, 476 N.W.2d 1130 (1986). Concurrent jurisdiction conflicts are not limited to the courts of two sovereigns. Indeed, this court has held that the various district courts across the state operate as independent tribunals and,

thus, have concurrent jurisdiction. *State, ex rel. Minnesota Nat. Bank of Duluth v. District Court, Fourth Judicial District, et al.*, 195 Minn. 169, 173, 262 N.W. 155, 157 (1935).

When a concurrent jurisdiction problem arises, the proceedings of one court will usually be stayed or dismissed, often through the use of the abstention doctrine. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 806, *reh'g denied*, 426 U.S. 912 (1976). Abstention is a "narrow exception to the duty of a District court to adjudicate a controversy properly before it." *Id.* at 813. It is appropriate only in limited circumstances, when continuing federal proceedings would be improper or moot, given the anticipated outcome of state proceedings. *Id.* at 814-16. Generally, however, comity between courts will resolve instances "[w]here two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction- * * * may dispose of the whole controversy * * * ." *Minnesota National Bank of Duluth*, 195 Minn. at 173, 262 N.W. at 157. Although, unlike some concurrent jurisdiction cases, there are not two competing lawsuits here – one in tribal court and one in state court – we think that concept provides a useful framework for discussion.

In this matter, we find no federal prohibition on state court consideration of civil claims arising out of the acts of Indian business entities occurring outside of Indian country. Further, we believe Gavle would ordinarily be expected to try all her claims in one judicial proceeding; that is, it would be highly inappropriate to allow her to proceed against LSI in two judicial fora, with some allegations of tortious conduct arising within Indian country

to be considered in tribal court and those arising outside to be considered in state court. Thus, we conclude that state courts have jurisdiction of Gavle's claims, including those arising within Indian country (although, of course, tribal courts, may have jurisdiction, as well).[5]

However, as in cases involving concurrent jurisdiction, instances of jurisdictional disputes between tribal and state courts also raise the question of whether that jurisdiction should be exercised. The abstention doctrine and the "first to file" rule are not truly rules at all, but principles, a "blend of courtesy and expediency." *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 955 (D.Minn. 1981), *aff'd.* 664 F.2d 660 (8th Cir. 1981). These "principles" "should be applied in a manner serving sound judicial administration." *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985). In Indian law matters, the related concept is identified as "infringement," which brings us to our next issue.

---

[5] The Supreme Court has repeatedly recognized that tribal courts have inherent power to exercise civil jurisdiction over non-Indians in disputes affecting the interests of Indians which are based upon events occurring in Indian country. *Montana v. United States*, 450 U.S. 544, 566, *reh'g denied*, 452 U.S. 911 (1981). We note further that the Judicial Court of the Shakopee Mdewakanton Sioux Community has previously ruled that LSI enjoys the same sovereign immunity as the tribe itself. *See, e.g., Calver Security Systems v. Little Six, Inc.*, Court File No. 026-92, slip op. at 3-4 (Shakopee Mdewakanton Sioux (Dakota) Tribal Court June 14, 1995k).

Infringement

As LSI notes, the governing federal principle in determining whether a court should exercise concurrent jurisdiction of the kind present here is one of deference. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 175 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Duluth Lumber and Plywood Co. v. Delta Development*, 281 N.W.2d 377, 382 (Minn. 1979). The doctrine at work is referred to both as "infringement" and as "preemption."

The Supreme Court views preemption as an additional means of protecting Indian sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The Court held that preemption "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state * * * and tribal interests at stake * * * to determine whether * * * the exercise of state authority would violate federal law." *Id.* at 145. Further, the Supreme Court, in *Williams v. Lee*, held that the general rule is that the exercise of state court jurisdiction must not "undermine the authority of the tribal courts over Reservation affairs" nor "infringe on the right of Indians to govern themselves." 358 U.S. 217, 223 (1959). The Iowa Supreme Court, considering a similar question, said "[i]f the state interest is greater and does not encroach on Native American interests, the state may act." *Meier v. Sac and Fox Indian Tribe of the Mississippi in Iowa*, 476 N.W. 2d 61, 64 (Iowa 1991).

The Court expanded upon this principle in two cases, *National Farmers Union Ins. Co. v. Crow Tribe of Indians*,

and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). *LaPlante* involved the question of whether a federal court should "stay its hand" in order to allow a tribal court a "full opportunity to determine its own jurisdiction." *LaPlante*, 480 U.S. at 16 (quoting *National Farmers Union*, 471 U.S. at 857). In *National Farmers Union*, the Court held that exhaustion of tribal court remedies allowed the tribal court the opportunity to explain why it took jurisdiction and allowed other courts the opportunity to benefit from the tribal court's "expertise in such matters * * * ." *National Farmers Union*, 471 U.S. at 857. The *LaPlante* court held that no state court jurisdiction could "interfere with tribal sovereignty and self-government" of a tribe as a "matter of federal law." *LaPlante*, 480 U.S. at 15. However, the Court went on to state that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite." *Id.* at 16 n.8.

The Supreme Court's reasoning in many of the infringement cases turns upon the vital role that tribal courts play in tribal self-government, especially where the question to be considered is, in the first instance, the jurisdictional limits of the tribal courts themselves. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-333 (1983); *United States v. Wheeler*, 435 U.S. 313, 332 (1978). However, the infringement doctrine has also been considered in contexts other than questions of the tribal court's jurisdiction. For example, the question of the validity of certain claims alleged to arise under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1994), has been held to require exhaustion of tribal court remedies before a federal district court will take jurisdiction. *Prescott v. [illegible] Six, Inc.*, 897 F.Supp.

1217, 1224 (D. Minn. 1995); *see also Reservation Telephone Cooperative v. Three Affiliated Tribes of Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996) (validity of tribal taxation of telephone lines and rights-of-way); *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995), *reh'g denied* (May 23, 1995) (validity of tribal taxation of coal mining "source gains").

It should also be noted that the application of the infringement doctrine occurs largely in federal court. There are few instances of a state court deferring to the jurisdiction of a tribal court, where they shared concurrent jurisdiction. Further, we have found few cases in which a state court has been asked to require exhaustion of tribal court remedies when the underlying question to be resolved is whether a tribal business entity may assert the tribe's sovereign immunity. *See, e.g., Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), *cert. denied, Pueblo of Acoma v. Padilla*, 490 U.S. 1029 (1989); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376 (Ariz. Ct. App. 1983); *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971). The opinions in these cases do not address the question of the jurisdiction of the state court to decide the sovereign immunity issue because jurisdiction was, apparently, assumed to exist. Therefore, we are left without controlling precedent or even persuasive case law on the issue of whether a state must defer to the tribal court on the question of whether a tribal business entity may assert the defense of sovereign immunity.

Although the question is a close one, we conclude that the consideration by Minnesota state courts of

whether LSI may assert the defense of sovereign immunity does not "undermine the authority of the tribal courts" nor "infringe on the ability of Indian tribes to govern themselves." *Williams*, 358 U.S. at 223. Minnesota state courts have a strong interest in determining for our citizens the nature of the legal claims that they may assert against tribal business entities and the defenses that may be raised in response. *See Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 366, 225 N.W.2d 238, 243 (1974). Furthermore, contrary to LSI's assertions, we do not seek to change the tribal laws, to reduce the community's ability to govern itself, or to remove the tribal court's jurisdictional claims to actions involving on-reservation activities. Instead, we choose to take jurisdiction only to establish Minnesota law on the issue of sovereign immunity for tribal business entities, in the hope that in so doing, we may avoid future disputes and pave the way to better understanding between the judicial systems.

Sovereign Immunity

Because we have jurisdiction to hear Gavle's claim, and we choose to exercise it, we now address the issue of sovereign immunity. It is settled law that tribes have the privilege of sovereign immunity, granted to them by Congress and existing at the sufferance of Congress. *Rice v. Rehner*, 463 U.S. 713, 719 (1983). "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote federal policies of tribal self-determination, economic development, and cultural autonomy." *American Indian Agricultural Credit Consortium, Inc., v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (citations

omitted). Sovereign immunity has been successfully asserted as an affirmative defense to suit in federal or state court by tribes and their officers acting within the scope of their authority, and by some tribal entities. *See, e.g., United States v. Kagama,* 118 U.S. 375, 383-84 (1886); *Weeks Construction, Inc. v. Oglala Sioux Housing Authority,* 797 F.2d 668, 671 (8th Cir. 1986); *Snow v. Quinault Indian Nation,* 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied,* 467 U.S. 1214 (1984).

The question before us today is whether LSI is the kind of tribal entity, analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether it is more like a commercial business enterprise, instituted solely for the purpose of generating profits for its private owners. Gavle argues that LSI is a mere commercial activity, a corporation organized to generate profits, which happens to have its principal place of business on the reservation and whose owners happen to be Indians. Relying on the Arizona state supreme court decision in *Dixon v. Picopa Constr. Co.,* 160 Ariz. 251, 772 P.2d 1104 (1989), she contends that LSI serves no function akin to that of tribal government and thus cannot benefit from the sovereign immunity possessed by the tribe. Referring to its earlier case of, *White Mountain Apache Indian Tribe v. Shelley,* 107 Ariz. 4, 480 P.2d 654 (1971), which extended sovereign immunity to a tribal owned business entity, the *Dixon* court held that Picopa Construction Co., a tribal-owned corporation, was not a "subordinate economic organization" and thus did not have sovereign immunity. *Dixon,* 160 Ariz. at 258, 772 P.2d at 1111.

LSI, in turn, argues that the corporation was organized under the tribal ordinances and empowered with the same rights and privileges as the tribe. LSI points to a number of cases in which courts have extended the reach of a tribe's sovereign immunity to entities that were, in some way, subordinate organizations of the tribe. The Eighth Circuit has, for example, held that immunity existed for a tribal-chartered housing authority. *Weeks Construction*, 797 F.2d at 671; *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Auth.*, 395 F. Supp. 23, 28 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). The New York Court of Appeals recently found sovereign immunity extended to a non-profit, state-chartered corporation. *In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 560, 658 N.E.2d 989, 993, 635 N.Y.S.2d 116, 120 (1995). Finally, the Seventh Circuit Court of Appeals has held that a contract with a wholly-owned tribal corporation, whose manufacturing facility was located within the boundaries of a reservation, was to be treated as a contract with the tribe itself. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 809-10 (7th Cir. 1993), *cert. denied, Sioux Mfg. Corp. v. Altheimer & Gray*, 510 U.S. 1019 (1993).

The connection between a tribal housing agency or social service agency and its "parent" tribe is relatively clear. But, the demarcation between those business entities so closely related to tribal governmental interests as to benefit from the tribe's sovereign immunity and those so far removed as to be treated as mere commercial enterprises is not as clear. As noted in a recent federal circuit court opinion, "whether tribal sovereign immunity now extends to commercial activities is an important,

complex and unresolved question," which the U.S. Supreme Court has never directly considered. *In re Greene v. Mt. Adams Furniture*, 980 F.2d 590, 600-601 (9th Cir. 1992), *cert. denied, Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994) (Rymer, J., concurring). It may be, as a federal district court in Wisconsin determined in a case with facts closely analogous to the instant case that " 'an action against a tribal enterprise is, in essence, an action against the tribe itself.' " *Barker v. Menominee Nation Casino*, 897 F.Supp. 389, 393 (E.D. Wis. 1995) (quoting *Local IV-302 Int'l Woodworkers Union of Am. v. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D. Wis. 1984)). In *Barker*, a tribal gaming commission and casino were found to be immune from suit. 897 F.Supp. at 393. To aid our analysis, we turn to the criteria that courts other than the U.S. Supreme Court have developed in examining similar fact patterns.

In *Shelley*, the Arizona Supreme Court, in addition to examining the closeness of the connection between the tribe and the business entity, looked to the intended purpose of the business entity. *Shelley*, 107 Ariz. at 7, 480 P.2d at 657. Applying this standard in the *Dixon* case, the Arizona court rejected the Picopa Construction Co.'s request for sovereign immunity partly because the business entity at issue was formed "solely for business purposes and without any declared objective of promoting the * * * general tribal or economic development * * * ." *Dixon*, 160 Ariz. at 257, 772 P.2d at 1110. Thus, the *announced purpose* for which the business entity was formed is a strong factor in determining whether it may benefit from the tribe's sovereign immunity.

In addition to considering the general purpose for which the business entity was formed, the *Dixon* court also identified the following questions as important factors to determine the extension of sovereign immunity.

> 1) Was the business entity formed to manage or exploit specific tribal resources?
>
> 2) Would the federal policy designed to protect Indian assets and tribal cultural autonomy be furthered by extension of sovereign immunity to the business entity?

Dixon, 160 Ariz. at 257-58, 772 P.2d at 1110-11.

A more detailed approach was recently adopted by the New York Court of Appeals. The court outlined six factors to be considered in determining whether a tribal business entity should be extended the protection of sovereign immunity enjoyed by the tribe itself:

> 1) whether the entity is organized under the tribe's laws or constitution rather than federal law;
>
> 2) whether the organization's purposes are similar to or serve those of the tribal government;
>
> 3) whether the organization's government body is comprised mainly of tribal officials;
>
> 4) whether the tribe has legal title or ownership of property used by the organization;
>
> 5) whether tribal officials exercise control over the administration or accounting activities of the organization; and

> 6) whether the tribe's governing body has power to dismiss members of the organization's governing body.

In re Ransom, 86 N.Y.2d at 559, 658 N.E.2d at 992, 635 N.Y.S.2d at 119.

Taking into account the reasoning of these cases, we conclude that the principal factors to be considered in determining whether tribal sovereign immunity extends to a tribal business entity are three:

> 1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;
>
> 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and
>
> 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.

Applying these factors to the facts at hand, we conclude that, as a tribal business entity, organized for the general benefit of the Community and closely linked to the governing structure of the Community, LSI is entitled to sovereign immunity from civil action in state court.

First, we note that LSI was created for the specific purpose of "improv[ing] the business, financial or general welfare of the Corporation, the Members of the Corporation, and the Community." Articles of Incorporation, *supra*, at § 3.0. While Gavle may argue that LSI's economic activity serves no governmental purpose, the U.S. Supreme Court, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), relied upon the Bureau of

Indian Affairs' view that "tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination." *Id.* at 217-18 n.21 (quoting an affidavit submitted to the court by the Director of Indian Services for the Bureau of Indian Affairs). This seems to recognize the unique role that Indian gaming serves in the economic life of here-to-fore impoverished Indian communities across this country.

As noted by the Fifth Circuit Court of Appeals, "[t]he fact that the [tribe] was engaged in an enterprise private or commercial in character, rather than governmental, is not material [to the availability of sovereign immunity]. It is in such enterprises and transactions that the Indian tribes and the Indians need protection." *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood,* 361 F.2d 517, 521 (5th Cir.), *cert. denied, Maryland Cas. Co. v. Seminole Tribe of Florida, Inc.,* 385 U.S. 918 (1966).

Further, LSI is owned wholly by the Community, as a governmental unit, unlike business enterprises organized under the corporate laws of Minnesota, the ownership of which is typically vested in private citizens, for their personal benefit. LSI's Board of Directors must include at least three members of the Community Business Council and a majority of the Board of Directors must be members of the Community. Articles of Incorporation, *supra,* at §§ 7.3 and 7.41. Also, directors may be removed from office in a proceeding commenced by 10% of the corporation (who are all of the members of the Community) in the Mdewakanton Sioux Community Court. *Id.* at § 7.152.

There is, therefore, a close link between the Community and the management of LSI.[6]

We also note that federal statutory law supports the notion that gaming activity is closely linked to the well-being of the tribe. All Indian gaming is conducted pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1994). Under the provisions of IGRA, only tribal entities can engage in Indian gaming and gaming by Indian tribes is recognized as a "means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702 (1994). Thus, as a matter of federal law, LSI must be a tribal entity in order to conduct gaming authorized by the statute. A mere commercial activity, incorporated by Indian individuals for the ostensible purpose of conducting gaming in Indian country, would be prohibited from doing so under federal law. This seems to us a strong recognition of the close link between the tribe itself and LSI, the gaming business entity, and also of the federal policy encouraging tribal economic well-being through the operation of such gaming businesses.

The dissent seems to be influenced by the fact that LSI is a "for-profit, multi-million dollar" enterprise and therefore contends that our analysis under each of these factors is mistaken. With regard to the first factor, the

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[6] We note also that an amended Community Corporation Ordinance and restated Articles of Incorporation of LSI, filed after the commencement of this litigation, provide an even closer link between the members of the Community and the management of LSI. *See* Articles of Incorporation of Little Six, Inc. (amended, Feb. 28, 1995).

purpose for which the business entity is organized, the dissent asserts that the factor would favor immunity for LSI if LSI were engaged in activity, such as providing housing or educational services, that directly benefited the tribe. This point ignores the force of *Cabazon*, which found that gaming activities could further tribal economic development and self-determination. *Cabazon*, 480 U.S. at 217-19. The dissent also argues that the tribe is not involved in the day-to-day management of LSI and, therefore, LSI is more a private corporation than an extension of the tribal government. However, control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management. Lastly, the dissent asserts that granting sovereign immunity to LSI would be neutral, or possibly detrimental towards the federal goal of preserving tribal sovereignty and cultural heritage. We do not see how being successful in business and immune from suit necessarily undermines these goals. There is simply no way to avoid the fact that LSI is different from other corporations, regardless of how much money it makes – it is integrally related to the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribe, and is, therefore, different, despite surface similarities to other for-profit enterprises.

A further concern, if this court were to reject LSI's claim of sovereign immunity, is the intrusion by this court into matters of centuries old common law[7] and federal

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[7] See *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

policy, without the slightest suggestion from Congress or the United States Supreme Court that sovereign immunity for tribal corporations is now to be abandoned. We are reminded of the importance of the plenary role of Congress in determining the scope and application of the sovereign immunity doctrine in *United States v. Wheeler* where the Supreme Court stated:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

435 U.S. 313, 323 (1978).

Gavle's appeal here is not unlike that of the State of Oklahoma in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991). In relation to the collection of state tax on the sale of cigarettes to tribal members on tribal land, the state argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context," and that "no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws." *Id.* at 510. The Supreme Court rejected this argument, reaffirming again the unique role of Congress in determining circumstances where the doctrine of sovereign immunity should be modified:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine * * * . These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development * * * . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Oklahoma Tax Comm'n, 498 U.S. at 510 (citations omitted). While the time may well come, or even be upon us now, that a tribal owned corporation, operated for profit as is LSI, should as a matter of fairness and equity be subject to the same liabilities as a non-tribally owned corporation, it is not for this court to make that decision in the absence of some change in Congressional policy or direction from the U.S. Supreme Court indicating that under such circumstances elimination of the tribal corporation's sovereign immunity is appropriate.

Thus, we conclude that as a tribal business entity, formed to enhance the well-being of the Community and closely linked to it in governance, LSI has sovereign immunity from suit, unless it has waived that immunity by express and unequivocal action. We address the issue of waiver next.

Waiver

We begin with the basic tenet of Indian law that tribal sovereign immunity may be waived, but such a waiver must be express and unequivocal and may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Gavle here argues that the Articles of Incorporation allow LSI to waive any immunity from suit, relying upon the language of section 3.2 providing that

> The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction;

However,

> to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent.

Articles of Incorporation, *supra*, at § 3.2.

Based on these provisions it is clear that LSI was legally authorized to waive its sovereign immunity defense by "explicit consent," contained in a "contract or other commercial document" and "specifying the terms and conditions of such consent."

Gavle next asserts that these three requirements are met through LSI's registration with the Secretary of State as a foreign corporation, pursuant to Minn. Stat. § 303.01-.25 (1994). LSI's application to do business in Minnesota provides that the corporation irrevocably consents to service of process, as provided by Minn. Stat.

§ 303.13 (1994), and was signed by Allene Ross, vice-chair of LSI.

Thus, the issue before us is whether such a corporate registration and consent to service is the kind of "express and unequivocal" waiver of sovereign immunity that is called for under the Articles of Incorporation and that *Santa Clara Pueblo* and its progeny require. Like the court of appeals, we conclude that it is not. Quite simply, consent to service of process, and thus to personal jurisdiction, cannot be construed as an automatic waiver of an otherwise available affirmative defense. Presumably foreign corporations that register to do business in Minnesota do not understand that they are waiving their right to assert affirmative defenses, based, for example upon a statute of limitations, failure of consideration, accord and satisfaction and the like. *See* Minn. R. Civ. P. 8.03 (1996). Similarly, we conclude that LSI, by agreeing to service of process, cannot be said to have waived the affirmative defense of sovereign immunity.

This conclusion is fully in accord with controlling federal case law. While it is true, as Gavle argues, that no "magic words" are necessary to operate as a waiver of sovereign immunity, *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 563 (8th Cir.), *reh'g denied* (Apr. 21, 1995), *cert. denied*, 116 S.Ct. 78 (1995), there are simply no words here, magic or otherwise, that articulate the kind of clear abandonment of this powerful affirmative defense mandated by the Supreme Court. That kind of particularity is found, by contrast, in a tribal council resolution expressly waiving sovereign immunity. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982).

Furthermore, the New York Court of Appeals, in the face of an even more explicit state statutory provision, has recently held that the St. Regis Mohawk tribe did not waive its sovereign immunity merely by qualifying to do business as a foreign corporation in the state of New York.

> [T]he mere fact that a tribal corporation, by statute, has designated an agent for service of process or is empowered to "sue and be sued" does not automatically subject that corporate entity to any court's jurisdiction where jurisdiction is otherwise lacking. * * * [E]xpress invocation of the power to sue and be sued and submission to a particular forum by official tribal action is required.

Ransom, 86 N.Y.2d at 563, 658 N.E.2d at 995, 635 N.Y.S.2d at 122. We agree with this analysis.

Gavle also argues from cases which find the needed specificity in "sue and be sued clauses" contained in tribal contracts or other business documents. *See, e.g., Fontanelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970). If there were such a provision at issue here, our conclusion might indeed be different. LSI's articles of incorporation do indeed allow for a "consent to be sued," but they require that it be "explicit" and detailed as to "terms and conditions of the consent." We have no "sue or be sued" clause before us nor anything that specifies "terms and conditions of consent" and thus, there is no waiver of immunity based on this provision of the charter.

Finally, we also find inapposite Gavle's reliance on cases standing for the proposition that a foreign corporation that appoints an agent for service under Minn. Stat. § 303.13 necessarily consents to be sued. *See, e.g., Beales v. L.D. Schreiber & Co.*, 56 F. Supp. 814, 815 (D. Minn. 1944) (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)); *Rykoff-Sexton, Inc. v. American Appraisal Associates, Inc.*, 469 N.W.2d 88, 90 (Minn. 1991). It is enough to note that none of these cases dealt with the issue of a waiver of Indian tribal immunity, for which, as noted above, the Supreme Court has identified specific requirements. Further, at most, they represent the proposition that appointment of an agent may serve as a concession on the issue of personal jurisdiction.

The Supreme Court's holding in *Santa Clara Pueblo* created a high threshold on the issue of a tribe's waiver of its sovereign immunity and manifested strong public policy protective of tribal independence. We cannot conclude that a mere agreement to accept service of process rises to meet that threshold, and therefore, we hold that LSI did not waive its immunity from suit.

We note for the record that the dissent and other state judicial brethren have expressed displeasure that we find that sovereign immunity may extend to a tribal business entity. However, we find no statute or congressional mandate that denies Indian tribes their sovereign status. As recently as 1991, the Supreme Court noted that "[a] doctrine of Indian sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or limit it. * * * Instead, Congress has consistently reiterated its approval of the

immunity doctrine." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (citations omitted).

So, too, do we reiterate and reaffirm that doctrine by our holding today.

Affirmed.

DISSENT

KEITH, Chief Justice (dissenting in part).

I respectfully dissent. While I agree with the majority that state courts have concurrent jurisdiction with tribal courts in lawsuits of this type, I disagree with the majority's conclusion that for-profit, multi-million dollar private tribal businesses like Little Six, Inc. (LSI) may rely upon the same sovereign immunity defense to which the tribe itself is entitled. As the majority frames the issue, the question is whether LSI is a tribal entity "analogous to a governmental agency" which should benefit from the sovereign immunity defense, or whether LSI is in fact a "commercial business enterprise, instituted solely for the purpose of generating profits for its private owner." It seems to me that LSI clearly fits the latter definition. Accordingly, I would reverse the decision of the court of appeals and permit Gavle to pursue her various claims against LSI in state court.

The result of the majority's decision in this case is to grant total immunity from suit to a complex, for-profit corporate entity with hundreds of employees which

transacts business both inside and outside Indian country. By extending the sovereign immunity defense to include LSI, the majority ignores the historical purpose of the sovereign immunity doctrine in this country as applied to Indian tribes, which is to grant special independent sovereign status to Indian tribes and their *governmental* bodies. In no way does LSI conform to the ordinary conception of a non-profit, governmental entity entrusted with promoting the welfare of its citizens: clearly, LSI is first and foremost a *corporation* engaged in a for-profit business venture for the purely financial benefit of its shareholders.

The majority cites several factors which other courts have relied upon to answer the "important, complex and unresolved question" of whether tribal sovereign immunity protects commercial activities. Selecting just three of these factors, the majority then reaches the conclusion that LSI is entitled to sovereign immunity in this case. I disagree. First, the majority cites LSI's own Articles of Incorporation as "evidence" of LSI's intended purpose of "improving the business, financial or general welfare of the Corporation, Members of the Corporation, and the Community." This language, however, could be found in the articles of incorporation of any for-profit corporation and certainly does not suggest that LSI was intended to benefit the Community in the same sense as a housing authority, educational fund, agricultural cooperative or other extension of the tribal government intended solely to promote the tribe's well-being. Instead, it is clear from the trial court record that LSI's primary purpose is to generate profits for its shareholders (*i.e.*, the tribe's members) without any restrictions whatsoever on the use of

the funds from the casino. I do not mean to suggest that generating profits for the tribe's members is an improper or unethical objective, but merely point out that a corporation like LSI should not receive the same protections as tribal businesses whose funds are directed towards general improvements for the community as a whole, such as education, environmental protection, health care or job opportunities.[1]

Second, the majority is persuaded by the fact that LSI's single share of stock is owned by the Community as a whole, and that its Board of Directors must include a majority of Community members. However, this does not change the fact that LSI is a private corporation, registered to transact business in the State of Minnesota like any other private business, and certainly not an extension of the tribal government per se. Furthermore, LSI was not

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[1] *See, e.g., Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc.*, 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (N.Y. 1995) (non-profit tribal corporation organized to provide education and health services to tribe enjoyed tribe's sovereign immunity); *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971) (tribal agency empowered with management of tribe's timber resources was "subordinate economic organization" and therefore was immune from suit); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376 (Ariz. Ct. App. 1983) (agricultural venture created to promote economic welfare of Indian community and whose property was entirely owned by community was "subordinate economic organization" of tribal government and therefore entitled to tribal sovereign immunity).

incorporated under Section 17 of the Indian Reorganization Act, which extends sovereign immunity to corporations formed by tribal governments to further the tribe's economic interests. *See* 25 U.S.C. §§ 476, 477 (1994). The tribal government is not involved in the day-to-day operations of LSI's business ventures, does not select or supervise the board of directors, nor is tribal property threatened by judgments against the corporation. As the court of appeals found, LSI "was created as a separate economic entity, not subject to governmental control, incorporated under tribal law and not merely as an authorized tribal activity." *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995).

And finally, the majority claims that extending sovereign immunity to LSI will follow federal policy encouraging the tribe's autonomy and general welfare. However, denying sovereign immunity to LSI, a corporation whose primary responsibilities consist of running a casino, would not infringe upon the federal government's laudable goals of cultural preservation, conservation of natural resources owned by the tribe, or promotion of tribal self-government. The assets of the Community would not be jeopardized by court judgments against LSI, and in fact there is a persuasive argument that extending sovereign immunity to corporations like LSI could be potentially detrimental to the tribe's business interests. As the Arizona Supreme Court noted in *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 259, 772 P.2d 1104, 1112 (Ariz. 1989), "an Indian corporation's successful assertion of immunity, even in a negligence case, may deter persons or entities from entering into contractual relationships

with the Indian corporation or any other Indian corporation. Non-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune from suit."

I find substantial similarities between the facts at issue in this case and those considered by the Arizona court in *Dixon*. In that case, the court held that a construction company incorporated by an Indian tribe was not a "subordinate economic organization," and therefore was not entitled to assert the tribe's sovereign immunity defense in a tort action brought by an automobile driver following an off-reservation automobile accident. *Id.*, 772 P.2d at 1108-10 (citing *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971)). Like LSI, the Picopa Construction Company involved in the *Dixon* case had a board of directors separate from the tribal government and with exclusive administrative control of the corporation's day-to-day operations, was instituted as a for-profit business venture with the Community as the sole shareholder, was not organized under Section 17 of the Indian Reorganization Act, and was not intended to carry out the Community's governmental functions. *Id.* at 1107-11. I would follow the Arizona court's reasoning in *Dixon* and *Shelley*, and require that a business incorporated under tribal law show itself to be an extension of the tribal government in order to take advantage of the tribe's sovereign immunity defense. In this case, it is clear that LSI does not meet this test. In conclusion, I believe that Gavle should be permitted to pursue her claims

against LSI in state court because LSI is not an economic organization subordinate to the tribal government.

DISSENT

COYNE, Justice (dissenting).

I dissent. Little Six, Inc., applied for and was granted a certificate of authority to transact business in Minnesota as a foreign corporation in accordance with Chapter 303 of Minnesota Statutes. For more than 50 years before the incorporation of Little Six, Inc., Minnesota has accorded registered foreign corporations the following powers:

> After the issuance of a certificate of authority by the secretary of state and until cancellation or revocation thereof or issuance of a certificate of withdrawal, the corporation shall possess within this state the same rights and privileges that a domestic corporation would possess if organized for the purposes set forth in the articles of incorporation of such foreign corporation pursuant to which its certificate of authority is issued, *and shall be subject to the laws of this state*.

Minn. Stat. § 303.09 (1994) (emphasis added). Gavle complains of violation of the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1994). The requirements of the Minnesota Human Rights Act are applicable to the state and its political subdivisions as well as to private employers, and I can see no earthly reason for permitting a foreign corporation to depart the Shakopee Mdewakanton Sioux

(Dakota) reservation and to violate with impunity the human rights of Minnesota citizens while transacting business in Minnesota.

That Indian tribes retain a unique sovereignty is beyond dispute. When the members of the tribe reside on the reservation and confine their commercial activities to the reservation, the State of Minnesota may not and does not subject the tribe's members to the state's tax laws. *Brun v. Commissioner of Revenue*, 549 N.W.2d 91 (Minn. 1996). When, however, the sovereign becomes a merchant, his license to carry on his commercial activity on foreign soil and to carry on his trade with the inhabitants of the foreign state is expressly subject to the laws of the licensor. Little Six, Inc., like any other foreign corporation, must be deemed to have accepted the certificate of authority to transact business in Minnesota subject to its express limitations.

As Chief Justice John Marshall put it in 1812, although the "military force which supports the sovereign power and maintains the dignity and independence of a nation" is not subject to the jurisdiction of another sovereign nation whose borders the military force crosses under license to do so, "[a] prince, by acquiring private property in a foreign country, * * * may be considered as so far laying down the prince, and assuming the character of a private individual," that he subjects the property to the territorial jurisdiction. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 145 (1812).

In modern parlance that statement means that if a commercial entity enters a commercial arena outside its own territory pursuant to a Minnesota certificate of

authority to transact business as a foreign corporation, the foreign corporation is subject not merely to Minnesota's jurisdiction, but it is subject to the laws of Minnesota and the defense of sovereign immunity is, at the very least, of no more avail to the foreign corporation than it is to the state and its political subdivisions.

Therefore, I would reverse the lower courts and remand for vacation of the summary judgment in favor of Little Six, Inc.

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS

CO-95-133

Scott County
District Court File No. 9412423

Crippen, Judge

Jill Gavle,

Appellant,

vs.

Little Six, Inc., a foreign corporation d/b/a Mystic Lake Casino, et al.,

Respondents.

Ronald H. Usem
Craig D. Greenberg
Huffman, Usem, Saboe, Crawford & Greenberg, P.A.
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Filed: July 11, 1995
Office of Appellate Courts

SYLLABUS

1. An Indian tribal business corporation has sovereign immunity on a complaint alleging tortious conduct, including conduct off the tribe's reservation. Our declaration to withhold this application of tribal sovereign immunity, although persuasively advanced as a matter of public policy, would require lawmaking without guiding authority from the United States Congress, the United States Supreme Court or the Minnesota Supreme Court.

2. A tribal corporation does not waive sovereign immunity by registering in a Minnesota as a foreign corporation, nor by adoption of a corporate charter stating that it must consent to be sued.

Affirmed.

Considered by Crippen, Presiding Judge, Toussaint, Chief Judge, and Kalitowski, Judge.

OPINION

CRIPPEN, Judge

Appellant Jill Gavle challenges the trial court's application of sovereign immunity to an Indian tribal business corporation alleged to have engaged in tortious conduct on and off the reservation. We affirm, finding no warrant for this court to refuse to apply sovereign immunity, and finding that the respondent tribal business corporation did not expressely [sic] waive its immunity.

FACTS

Appellant alleges sexual harassment, pregnancy and race discrimination, civil rights violations, and various related torts arising from her employment with respondent Little Six, Inc., and the conduct of three Little Six officers. The alleged illegal acts occurred both on the Shakopee Mdewakanton Sioux Community reservation and at Little Six's corporate headquarters in Shakopee, off the reservation. Appellant is also suing the corporate officers individually, but these claims are not at issue on this appeal.

Appellant obtained employment with respondent Little Six, a business corporation formed by tribal ordinance of the Shakopee Mdewakanton Sioux Community. Little Six is registered as a foreign corporation in Minnesota. The corporation issued one share of stock when it was formed in 1991 and that share is owned by the Shakopee Mdewakanton Sioux Community as a whole. Each voting member of the community is entitled to one vote on corporate matters placed before the community for a vote.

Little Six's articles of incorporation, developed under authority of the community's business ordinances, provide that the purpose of the corporation is to "improve the business, financial or general welfare of the Corporation, Members of the Corporation, and the Community." The articles provide that the corporation has the same sovereign immunity from suit as the community except for claims by the community or members of the corporation against the corporation. But the corporation reserves the "power to sue and * * * to consent to be sued"

provided that a "contract or other commercial document * * * [specifies] the terms and conditions of such consent." And "consent to suit by the Corporation * * * [may not] be deemed a waiver of any of the rights, privileges and immunities of the Community."

The trial court granted summary judgment for Little Six on grounds that the corporation was immune from suit and, because Little Six had not consented to be sued, the trial court held that it had no subject matter or personal jurisdiction. The trial court held that registering with the secretary of state did not amount to a waiver of sovereign immunity.

ISSUES

1. Does sovereign immunity apply to tribal business corporation activity on and off the reservation?

2. Has Little Six expressly waived its sovereign immunity?

ANALYSIS

The trial court's summary judgment was granted as a matter of law on undisputed facts and is reviewed without deference to the trial court's determination. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

1. *Sovereign immunity*

The trial court had subject matter and personal jurisdiction over Little Six, a tribal business corporation, but sovereign immunity is a separate inquiry. *Duluth Lumber*

& Plywood Co. v. Delta Dev., Inc., 281 N.W.2d 377, 383 (Minn. 1979).[1]

Tribal sovereignty has been recognized in the law since 1832. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *See Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172-73, 97 S. Ct. 2616, 2621 (1977) (modern application). "There is no question that Indian tribes are generally immune from suit." *Duluth Lumber*, 281 N.W.2d at 383. Sovereign immunity, in part, protects the remnant of Indian resources from judgments that would deplete those assets. *See Cogo v. Central Council of Tlingit & Haida Indians*, 465 F.Supp. 1286, 1288 (D. Alaska 1979); *Atkinson v. Haldane*, 569 P.2d 151, 174 (Alaska 1977). But the scope of the immunity is not absolute, and Congress with its plenary powers has unlimited authority to waive or limit a tribe's sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978).

Tribal Sovereignty of the Shakopee Mdewakanton Sioux Community is further evidenced by its organization under the Indian Reorganization Act of 1934, 25 U.S.C.A. § 476 (Supp. 1995) (hereinafter Section 16 tribal government corporation). The purpose of the Act is "to rehabilitate the Indian's economic life and to give [Indians] a chance to develop the initiative destroyed by a

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[1] The trial court had personal jurisdiction over Little Six by virtue of its registration as a foreign corporation in Minnesota and appointment of an agent for service of process. Minn. Stat. § 303.13, subd. 1 (1992); *Rykoff - Sexton, Inc. v. American Appraisal Assoc., Inc.*, 469 N.W.2d 88, 90 (Minn. 1991). It also had subject matter jurisdiction over the claims stated against Little Six. *Duluth Lumber*, 281 N.W.2d at 381.

century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S. Ct. 1267, 1272 (1973) (citation omitted). The Indian Reorganization Act provides that a tribal government may incorporate under Section 16 to further economic interests and to be protected by sovereign immunity. *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1131 (D. Alaska 1978).

2. *Application of Sovereign Immunity to Tribal Corporation*

Courts have applied sovereign immunity to both tribal governments and their business activities. *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 657 (Ariz. 1971); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 424 (Ariz. 1968); *North Sea Pros. Ltd. v. Clipper Seafoods Corp.*, 595 P.2d 938, 941-42 (Wash. 1979). But this broad application of sovereign immunity must be examined in light of the Indian Reorganization Act, which separates tribal enterprises into tribal governmental and tribal business corporations.

Congressional intent to treat some tribal business corporations as entities distinct from the tribe itself is manifested in the Indian Reorganization Act, 25 U.S.C. § 477 (Supp. 1990) (hereinafter Section 17 tribal business corporation). Section 17 is the counterpart to Section 16, which governs tribal government corporations. *Parker Drilling Co.*, 451 F.Supp. at 1131; *Atkinson*, 569 P.2d at 174-75. Section 17 provides for the formation of tribal business corporations which may further the economic

interests of the community. *Atkinson*, 569 P.2d at 174. Congress enacted Section 17 out of concern that tribal government corporations would be at an economic disadvantage because banks and other businesses would be reluctant to engage in transactions with entities that enjoy sovereign immunity. *Parker Drilling Co.*, 451 F. Supp. at 1131; *Atkinson*, 569 P.2d at 172, 174; *see also*, William V. Vetter, *Doing Business with Indians and the Three "s'es"*, 36 Ariz. L. Rev. 169, 175 (1994) (hereinafter Vetter).

The model articles of incorporation for Section 17 tribal business corporations contain a "sue and be sued" clause that constitutes a waiver of sovereign immunity and subjects the tribal business corporation, but not the tribe, to suit "consistent with the [Indian Reorganization Act's] purpose." Vetter, 36 Ariz. L. Rev. at 175. In this way tribal business corporation property is risked, leaving the tribal property safe from judgments. *Atkinson*, 569 P.2d at 175. But in its choice of language for Section 17, Congress does not require a "sue and be sued" clause or that all tribal businesses incorporate under its terms. Thus, although the Shakopee Mdewakanton Sioux Community incorporated under section 16 of the Indian Reorganization Act, Little Six was not incorporated under either Section 16 or 17, but under the tribe's business ordinances.

Against this history of the common law and the Indian Reorganization Act, application of sovereign immunity to tribal business corporations has begun to further erode because "tribal activities conducted outside the reservation present different considerations." *Mescalero Apache Tribe*, 411 U.S. at 148, 93 S. Ct. at 1270. "Absent express federal law to the contrary, Indians

going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49, 93 S. Ct. at 1270 (citations omitted). Little Six cites no "express federal law" that protects its off-reservation activities.

In *Mescalero,* dealing with the tribe's off-reservation ski resort operation, the U.S. Supreme Court refused to apply sovereign immunity when the state asserted its regulatory power to tax the enterprise. *Id.* at 147-48, 93 S. Ct. at 1270. The U.S. Supreme Court recently restated this limited recognition of tribal sovereign immunity in another taxation case. In *Oklahoma Tax Comm'n v. Chickasaw Nation,* 63 U.S.L.W. 4557, 4594 (U.S. June 14, 1995), the Court held that "the Tribe gains no support from the rule that Indians and Indian tribes are generally immune from state taxation as this principle does not operate outside Indian country." *Id.* at 4598 (citations omitted). Furthermore, in construing treaty language that is similar to Public Law 280, *infra,* by virtue of its application to persons and to tribal property, the Court held: "We comprehend this * * * language to provide for the Tribe's sovereignty within Indian country. We do not read the [language] as conferring super-sovereign authority to interfere with another jurisdiction's sovereign right[s]." *Id.* But the *Mescalero* and *Chickasaw Nation* opinions, while addressing the state's regulatory or taxing authority, provide no direction on the application of sovereign immunity to a tribal business corporation in the context of civil tort litigation in state courts.

In *Dixon v. Picopa Constr. Co.,* 772 P.2d 1104, 1111-12 (Ariz. 1989), the Arizona Supreme Court, the only state

court so holding, found that a tribal corporation with no government functions, created by tribal laws as a separate entity, and with liabilities not borne by the tribe, could not assert the tribe's immunity for off-reservation torts. The *Dixon* court distinguished between treatment of corporations that are subordinate economic organizations of the tribal government, entitled to sovereign immunity, and those that are for-profit businesses lacking government control. *Id.* at 1108-11. This distinction corresponds to congressional intent expressed in the Indian Reorganization Act.

Here, Little Six claims it is an arm of the tribal government, but this claim has no merit. Neither the form nor the substance of the Shakopee Mdewakanton Sioux Community business ordinances or Little Six's articles of incorporation support this conclusion. *See Mescalero,* 411 U.S. at 157 n.13, 93 S. Ct. at 1275 n.13 ("question of * * * immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business"). These documents show that Little Six was not created as a tribal government corporation under Section 16. It was created as a separate economic entity, not subject to governmental control, incorporated under tribal law and not merely as an authorized tribal activity. Little Six's board of directors is permitted to act outside the control of tribal officials, conduct business off the reservation, and its declared purpose does not include governmental activities. It has broad corporate powers and is organized as a for-profit entity. Tribal property is protected from judgments entered against the corporation. See *Dixon,* 772 P.2d at 1109-11 (factors that make tribal corporation separate and distinct organization from tribal government);

Vetter, 36 Ariz. L. Rev. at 178. Applying the reasoning of the Arizona court in *Dixon*, Little Six is not entitled to assert sovereign immunity, because it is a separate economic activity, and not subordinate to the tribal government.

Another court has reached a similar conclusion on claims arising from acts that occurred off the reservation but where the alleged cause of action was for breach of contract. *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) (unincorporated tribal business, registered to do business in the state). The *Padilla* court held that because there was no law limiting its jurisdiction and because New Mexico has a policy allowing suit against the state for breach of contract, comity required that the tribe should be similarly bound for off-reservation activity. *Id.* at 850-51.

The Ninth Federal Circuit rejected the reasoning of *Padilla*, holding that congressional silence regarding off-reservation commercial activities is "compelling, if not controlling * * * [s]ince only Congress can limit the scope of tribal immunity and it has not done so." *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992), *cert. denied*, ___ U.S. ___ (1994). The court further criticized the *Padilla* court for its reliance on comity, urging that federal tribal immunity law leads to the conclusion that tribal sovereign immunity does not stop at the reservation boundaries. *Id.* at 594-95. But the *Greene* court discussed the sovereign immunity of an Indian tribe and its subordinate tribal economic activities, not an independent tribal business corporation such as exists here and existed in *Dixon*.

The Minnesota Supreme Court has held that an Indian organization incorporated under a tribe's business ordinance is a separate legal entity that could be sued on a breach of contract claim arising off the reservation. *Duluth Lumber,* 281 N.W.2d at 384. But in that case sovereign immunity had been waived by operation of a "sue and be sued clause" in the contract.

Appellant argues that because Minnesota is a "Public Law 280" state, this court has jurisdiction over civil causes of action to which Indians are parties, and "those civil laws of such State * * * that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 28 U.S.C. § 1360 (1988).

Congress enacted Public Law 280 out of concern for lawlessness on some reservations, inadequate tribal law enforcement, and the state court's lack of jurisdiction over Indians. *Bryan v. Itasca County,* 426 U.S. 373, 379, 96 S. Ct. 2102, 2106 (1976). Public Law 280 waives sovereign immunity of Indians in that it gives Minnesota courts limited civil jurisdiction over actions "between Indians or to which Indians are parties" and "which arise in the areas of Indian Country." 28 U.S.C. § 1360(a).[2] Because Little Six is a separate legal and economic enterprise from the tribal government, appellant's argument has some

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[2] We note that "there is notably absent [from P.L. 280] any conferral of state jurisdiction over the tribes themselves." *Bryan,* 426 U.S. at 389, 96 S. Ct. at 2111; *see Atkinson,* 569 P.2d at 167 (clear expression of waiver of sovereign immunity absent from P.L. 280). Furthermore, P.L. 280 does not apply to the Red Lake Reservation. 28 U.S.C. § 1360(a).

merit. But P.L. 280 applies to Indians, not Indian tribes, *Bryan*, 426 U.S. at 388-89, 96 S. Ct. at 2111, and its is not clear concerning its application to tribal business corporations.

Ambiguities must be resolved in favor of the tribe, and the failure of Public Law 280 to address the status of tribal business corporations must be narrowly construed. *Bryan*, 426 U.S. at 81, 96 S. Ct. at 2107 ("omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities"); *Atkinson*, 569 P.2d at 166. Furthermore, because the Indian Reorganization Act's model articles of incorporation anticipated that a tribal corporation would be subject to suit by including a "sue and be sued" clause, this implies that sovereign immunity applies in the absence of such a clause. Here, there is no "sue and be sued" clause.

In sum, appellant's contentions on appeal find support only in an Arizona State Court decision, and to a lesser extent in New Mexico. And Congress has left the issue unresolved. The Indian Reorganization Act was intended to provide a waiver of sovereign immunity to tribal business corporations, but only when accomplished by articles of incorporation. And Public Law 280 has unclear ramifications for tribal business corporations. Our declaration that a tribal business corporation has no sovereign immunity for off-reservation activities is unwarranted in the absence of direction from Congress, the Supreme Court of the United States, or the Minnesota Supreme Court.

Although appellant argues persuasively that a tribal business corporation conducting business off the reservation should be held legally accountable for its actions, because our supreme court has not spoken, and "[b]ecause of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case." *Atkinson* 569 P.2d at 163.

3. *Sovereign immunity must be expressly waived*

Because Little Six is entitled to immunity on the claims stated in this case, we must next determine if Little Six waived that immunity. Tribes, like Congress, may waive sovereign immunity to advance economic interests that may be thwarted if third parties perceive the tribes to be legally unaccountable for their business transactions. *United States v. Oregon*, 657 F.2d 1009, 1013-14 (9th Cir. 1981). Such a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677 (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953 (1976)). Consent may not be inferred, *see Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993), even if similar acts would constitute an implied waiver by a non-Indian government. *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377 (8th Cir. 1985). "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe*, 433 U.S. at 172, 97 S. Ct. at 2621.

Minnesota courts find a waiver of immunity for Indian tribal businesses where there exists express language such as that contained in a "sue and be sued" clause. *Duluth Lumber,* 281 N.W.2d at 384; *Dacotah Prop. v. Prairie Island Indian Community,* 520 N.W.2d 167, 171 (Minn. App. 1994), *pet. for rev. granted,* (Minn. Sept. 28, 1994), *appeal dismissed* (Minn. Feb. 7, 1995). But, no such clause is present in Little Six's articles of incorporation, nor in the Shakopee Mdewakanton Sioux Community ordinances. Rather, the articles of incorporation clearly state that Little Six must consent to be sued by contract or by another commercial document which specifies the terms and conditions of the consent. Here, no such express consent to suit exists.

Appellant argues that by registering as a foreign corporation and consenting to service of process, Little Six has waived immunity. But consent to service does not amount to a waiver of sovereign immunity. The Ninth Federal Circuit heard and rejected this argument in *Snow v. Oinault Indian Nation,* 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. den.,* 467 U.S. 1214 (1984). There, the court held that consent to service of process does not waive sovereign immunity because it would amount to a waiver of tribal immunity by individual tribal officers who agree to accept service of process, which is not possible in the law. *Id.* (quoting *United States v. United States Fidelity Co.,* 309 U.S. 506, 513, 60 S. Ct. 653, 656 (1940)). Other courts, too, have held that incorporating under the laws of a state does not amount to an express waiver of sovereign immunity. *Haile v. Saunooke,* 246 F.2d 293, 297-98 (4th Cir. 1957), *cert. denied,* 355 U.S. 893 (1957). And a settlement agreement subjecting land to the laws and jurisdiction of

the state does not result in an inferential waiver of sovereign immunity. *Maynard,* 984 F.2d at 16.

4. *Equal Protection under the Indian Civil Rights Act*

Appellant argues in passing that she is denied equal protection under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) because Little Six allows suit against it by the tribe and tribal members but not others. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo,* 436 U.S. at 56, 98 S. Ct. at 1675-76. Congress passed the 1968 law to impose certain restrictions on the tribes and provide protection similar to the Bill of Rights and Fourteenth Amendment. *Id.* at 57, 98 S. Ct. at 1676. But Congress has never authorized civil actions to be brought in state or federal courts for relief under the 1968 Act by waiving the tribe's sovereign immunity. *Id.* at 59, 98 S. Ct. at 1677. Instead, the 1968 law only provides for habeas corpus relief to test the validity of tribal action. *Id.* at 58, 98 S. Ct. at 1677. Appellant must seek relief under the Act in the tribal court. *Id.* at 65, 98 S. Ct. at 1680-81; *Snow,* 709 F.2d at 1323.

DECISION

The decision of the trial court to grant summary judgment in favor of respondent Little Six, Inc. is compelled under the existing state of the law on sovereign

immunity. Little Six has not expressly waived its sovereign immunity.

Affirmed.

/s/ J. Crippen
June 28, 1995

APPENDIX C

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF SCOTT — FIRST JUDICIAL DISTRICT

Jill Gavle,

Plaintiff,

vs.

Little Six, Inc, a foreign corporation d/b/a Mystic Lake Casino, Leonard Prescott, Allene Ross and William Johnson, individually,

Defendants.

Court File
No. 94-12423

ORDER

(Filed
Dec. 16, 1994)

The above entitled matter came on for hearing before the undersigned Judge of District Court on the 15th day of December, 1994, at the Scott County Courthouse.

Craig D. Greenberg, Esq., appeared on behalf of plaintiff; Joseph Plumer, Esq., appeared on behalf of defendant Little Six, Inc.; Douglas Kelley, Esq., appeared on behalf of defendant Leonard Prescott; B. Todd Jones, Esq., appeared on behalf of defendant Allene Ross; and Larry Leventhal, Esq., appeared on behalf of defendant William Johnson.

Defendants Little Six, Inc. and Allene Ross moved for dismissal of the lawsuit based upon lack of personal and subject matter jurisdiction, and failure to state a claim upon which relief can be granted.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED AS FOLLOWS:

1. That the motion to dismiss of defendant Little Six, Inc. is granted.

2. That the motion to dismiss of defendant Allene Ross is denied.

3. That the attached memorandum is incorporated by reference herein.

Dated: December 16, 1994.

BY THE COURT:

/s/ Thomas R. Howe
Thomas R. Howe
Judge of District Court

MEMORANDUM

Plaintiff was employed by Little Six, Inc. as a security guard. Plaintiff alleges that during the time she was employed she was subjected to unlawful sexual harassment, pregnancy discrimination, race discrimination, defamation, assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, tortious interference with the employment relationship, violation of Minnesota and federal leave acts, violation of 42 U.S.C. Sec. 1981, and violation of the Indian Civil Rights Act under 25 U.S.C. 1302(8).

Defendant Little Six, Inc. argues that the Shakopee Mdewakanton Dakota community is a federally recognized Indian tribe and is therefore immune from suit by virtue of its status as a sovereign nation. Defendant Little Six, Inc. is an entity of that tribe. Tribal sovereign immunity shields defendant Little Six, Inc. from suit unless there is a clear and unequivocal waiver of that immunity. It contends that no express waiver of sovereign immunity has been made.

Plaintiff contends that since Little Six, Inc. registered as a foreign corporation with the Secretary of State, it has waived its claim to sovereign immunity. In addition, the Articles of Incorporation of defendant Little Six, Inc. contain a "consent to sue and be sued" clause, thereby submitting to the jurisdiction of this court.

Articles 3.1 and 3.2 of the Articles of Incorporation state in relevant part:

> 3.1 Sovereign Immunity of Corporation. The Shakopee Mdewakanton Sioux Community confers on the Corporation all of the Community's rights, privileges and immunities concerning federal, state and local taxes, regulation and jurisdiction, and sovereign immunity from suit, to the same extent that the Community would have such rights, privileges, and immunities if it engaged in activities undertaken by the Corporation. Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.
>
> 3.2 Consent to Sue and Be Sued Required. The corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux

> Community or another court of competent jurisdiction; provided, however, that any recovery against the Corporation shall be limited to the assets of the Corporation delineated at Article 6 of these Articles of Incorporation, and that to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent.

Defendant states that the language of the Articles of Incorporation are clear and unequivocal that Little Six, Inc. is not subject to suit unless it consents to such suit. The Board of Directors must explicitly consent to be sued in a contract or other commercial document that specifies the terms and condition of such consent. Since the Board has not specifically consented to suit in this Court, the Court has no jurisdiction over Little Six, Inc.

The Articles of Incorporation are clear and definite. Without a specific consent to be sued in this case by the Board of Directors, this Court has no jurisdiction. Simply registering with the Secretary of State for the purposes of service of process is not consistent with the well settled law that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978) (citations omitted). Consenting to service of process is not a waiver of sovereign immunity. *Snow v. Quinault Indian Nation,* 709 F.2d 1319 (9th Cir. 1983) *cert. denied,* 467 U.S. 1214 (1984). Consequently, the motion to dismiss made by defendant Little Six, Inc. is granted.

Defendant Allene Ross claims that as a corporate officer of Little Six, Inc., she is also immune from suit. Defendant Ross also argues that the state court lacks subject matter jurisdiction in cases arising out of conduct between Indians and non-Indians on Indian Reservations.

Tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority. *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (1983) *citing United States v. Oregon*, 557 F.2d 1009, 1012, n. 8 (9th Cir. 1981); *Hegner v. Dietze*, Minnesota Court of Appeals File No. CX-94-839 (Filed December 13, 1994). Defendant Allene Ross' immunity from suit will depend on whether or not she was acting in her representative capacity and within the scope of her authority as to plaintiff's allegations. This is a fact issue which must be determined at trial.

Under 28 U.S.C.A. Sec. 1360(a), Minnesota shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action. Subject matter jurisdiction is primary and an absolute stricture on the court. *In Re Prairie Island Dakota Sioux*, 21 F.3d 302, 304-5 (8th Cir. 1994) citing *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). Sovereign immunity operates essentially as a party's possible defense to a cause of action. *In Re Prairie Island Dakota Sioux*, 21 F.2d at 304 citing *Weeks Const., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668,

671-72 (8th Cir. 1986). Properly, this Court has subject matter jurisdiction. Therefore, defendant Ross' motion to dismiss is denied.

/s/ TRH
T.R.H.

APPENDIX D

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF SCOTT FIRST JUDICIAL DISTRICT

Jill Gavle,

Plaintiff,

vs.

Little Six, Inc., a foreign corporation d/b/a Mystic Lake Casino, Leonard Prescott, Allene Ross and William Johnson, individually,

Defendants.

CASE TYPE: Employment, Other Civil

Court File No. 94-12423

AFFIDAVIT OF CRAIG D. GREENBERG

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Craig D. Greenberg, being first duly sworn on oath, state as follows:

1. That I am an attorney for Plaintiff in the above-referenced matter;

2. That I am licensed to practice law in the State of Minnesota, with offices at 1000 Water Park Place, 5101 Olson Memorial Highway, Minneapolis, MN 55422;

3. That attached hereto and incorporated herein as Exhibit A is a true and correct copy of the Application of Foreign Corporation for a Certificate of Authority to

Transact Business in Minnesota executed by Little Six, Inc. dated April 23, 1991, on file with the Minnesota Secretary of State's Office;

4. That attached hereto and incorporated herein as Exhibit B is a true and correct copy of the Certificate of Authority to Transact Business in the State of Minnesota dated April 23, 1991 conferred upon Little Six, Inc. by the State of Minnesota, currently on file with the Minnesota Secretary of State; and

5. That attached hereto and incorporated herein as Exhibit C is a true and correct copy of the Notice of Change of Registered Office executed by Little Six, Inc. dated June 29, 1992 and filed with the Minnesota Secretary of State.

Further your Affiant saith not.

Dated: December 6, 1994

/s/ Craig D. Greenberg
Craig D. Greenberg

Subscribed and sworn to before me
this 6th day of December, 1994.

/s/ Diane M. Brustad
Notary Public

[SEAL] DIANE M. BRUSTAD
NOTARY PUBLIC MINNESOTA
ANOKA COUNTY
My Commission Expires
Mar. 4, 1997

EXHIBIT A

State of Minnesota
Office of the Secretary of State

[SEAL]

APPLICATION OF FOREIGN CORPORATION FOR A CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS IN MINNESOTA
180 State Office Building, St. Paul, MN 55155

0056218

Please send a certificate of good standing (sometimes called a certificate of status) for this corporation signed by the filing officer of the state under the laws of which the corporation is organized.

1. The name of this corporation, which is registering in compliance with Section 303.06 of the Minnesota Foreign Corporation Act, is:

   Legal Name of Corporation
   Little Six, Inc.
   Note: To determine whether this name is available, call (612) 296-2803.

2. The alternative name in Minnesota (if applicable) from item 5 is:

   Name Used in Minnesota (if Different)

3. The state or country under the laws of which the corporation is incorporated is:

   Governed Under the Laws of the State of Community of
   Shakopee Mdewakanton Sioux

4. The address of its proposed registered office in the State of Minnesota is: (see note below)*

Address of the Corporate Registered Agent in Minnesota (Number, Street, City, State, Zip Code)

2330 Sioux Trail N.W., Prior Lake, Minnesota 55372

and the name of its registered agent (who must be located at that address) is:

Name of the Corporate Registered Agent in Minnesota

Leonard Prescott

*Note: If the address listed for item 4 is not the location where the registered agent can be found, change it to such a location. This is vitally important.

The corporation irrevocably consents to service of process on it as provided by Minnesota Statutes 303.13 or any amendment thereof or successor thereto.

I certify that I am authorized to execute this application and I further certify that I understand that by signing this application, I am subject to the penalties of perjury as set forth in section 609.48 as if I had signed this application under oath.

/s/ Allene K. Ross
(President, Vice-Chair, Secretary or Assistant Secretary)

SC-00191-02
Filing Number:

Filing Stamp: 0056218
STATE OF MINNESOTA
DEPARTMENT OF STATE

FILED
APR 23, 1991

Joan Anderson Growe
Secretary of State

56218

State of Minnesota

SECRETARY OF STATE

Certificate of Authority to Transact Business

I, Joan Anderson Growe, Secretary of State of Minnesota, do certify that: The following corporation has duly complied with the relevant provisions of Minnesota Statutes, Chapter 303, and is authorized to do business in Minnesota on and after this date with all the powers, rights and privileges, and subject to the limitations, duties and restrictions, set forth in that chapter.

Name of Corporation in Minnesota:

Little Six, Inc.

Name of Corporation in State of Incorporation:

Little Six, Inc.

Corporate Charter Number: 56218

State of Incorporation: XX

Registered Office in Minnesota:
2330 Sioux Trl NW
Prior Lake MN 55372

Name of Registered Agent: Leonard Prescott

This certificate has been issued on 04/23/1991.

Joan Anderson Growe
Secretary of State.

BEST AVAILABLE COPY

EXHIBIT C

[SEAL]

State of Minnesota
Office of the Secretary of State

Notice of Change of
Registered Office – Registered Agent or Both
by

Name of Corporation
Little Six, Inc.

Pursuant to Minnesota Statutes, Section 302A, 123, 303.10, 317.19, 317A.123 or 308A.025 the undersigned hereby certifies that the Board of Directors of the above named Corporation has resolved to change the corporation's registered office and/or agent to:

Agent's Name
If you do not wish to designate an agent, you must list "NONE" in this box. DO NOT LIST THE CORPORATE NAME

Leonard Prescott

Address (No. & Street)
(You may not list a P.O. Box, but you may list a rural route and box number)

2400 Mystic Lake Blvd.

City	**County**		**Zip**
Prior Lake	Scott	MN	55372

Mailing Address
(If different than address above – P.O. Box is acceptable)

City **County** **Zip**
MN

The new address may not be a post office box. It must be a street address, pursuant to Minnesota Statutes, Section 302A.011, Subd. 3., 303.02, Subd. 5, 317.02 Subd. 13., 317A.01 Subd. 2.

This change is effective on the day it is filed with the Secretary of State, unless you indicate another date, no later than 30 days after filing with the Secretary of State, in this box:

July 1, 1992

I certify that I am authorized to execute this certificate and I further certify that I understand that by signing this certificate I am subject to the penalties of perjury as set forth in section 609.48 as if I had signed this certificate under oath.

Name of Officer or Other Authorized Agent of Corporation
LEONARD L. PRESCOTT
(Please Print)

Signature
/s/ Leonard L. Prescott

Date
June 29, 1992

Title or Office
Chairman

Do not write below this line. For Secretary of State's use only.

Receipt Number
751814

Filing Fee: $35.00

Return to:
Business Services
Division
Office of the Secretary
of State
180 State Office
Building
St. Paul, MN 55155
(612) 296-2803

Make checks payable to:
Secretary of State

File Data D.A.R.
STATE OF MINNESOTA
DEPARTMENT OF STATE

FILED

JUL 06 1992

Joan Anderson Growe

Secretary of State

APPENDIX E

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF SCOTT FIRST JUDICIAL DISTRICT

Jill Gavle,

Plaintiff,

vs.

Little Six, Inc., a foreign corporation d/b/a Mystic Lake Casino, Leonard Prescott, Allene Ross and William Johnson, individually,

Defendants.

CASE TYPE:
Employment Other Civil

Court File No. 94-12423

AFFIDAVIT OF JILL GAVLE

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

I, Jill Gavle, being first duly sworn on oath, state as follows:

1. That I am the Plaintiff in the above-referenced matter;

2. That I currently reside in the State of Minnesota;

3. That from March, 1992 and through June, 1993 I worked as a Security Officer for Little Six, Inc.;

4. That during March, 1992, I saw a help wanted advertisement in the Minneapolis Star Tribune for

employment with Little Six, Inc. and Mystic Lake Casino. The advertisement said that security guard job opportunities were available for students and directed interested persons to go to the Little Six, Inc. Human Resources Department at the Canterbury Inn, Shakopee, Minnesota. A copy of one of these advertisements is attached hereto as Exhibit A. Other Little Six, Inc. help wanted advertisements are attached hereto as Exhibit B;

5. That when I applied for a permanent position with Little Six, Inc., I was directed to the Human Resources Department at Little Six, Inc., which offices were located at 1244 Canterbury Road, Shakopee, MN 55379, in the building known as the "Canterbury Inn" (the "Corporate Offices"). The Corporate Offices were located outside the boundaries of the Shakopee Mdewakanton Sioux Reservation (the "Reservation");

6. That after I was hired by Little Six, Inc., I was directed to complete all new employee paperwork and pick up my uniforms at the Canterbury Inn;

7. That I was at the Corporate Offices on numerous occasions for employee functions, including training seminars and the employee reorientation for the Mystic Lake grand opening;

8. That as part of my regular Little Six, Inc., job duties, I was assigned to security patrol duty at the Canterbury Inn and was stationed at the Corporate Offices overnight;

9. That I was scheduled by Little Six, Inc., to work at the Canterbury Inn on the average of at least one night per week from March, 1992 through August, 1992;

10. That between March, 1992 and August, 1992, I was assigned to the Little Six, Inc., mobile patrol unit approximately six times. As part of its scheduled route, the mobile unit traveled to off-Reservation sites, including the Canterbury Inn, Canterbury Inn parking lot, Canterbury Downs Race Track parking lot, Little Six Uniform Office connected to Brook's Gas Station in Shakopee, and the Valleyfair Amusement Park parking lot (as a turn-around point);

11. That during all times that I worked for Little Six, Inc., all on-duty employees were required to park their vehicles at the Canterbury Downs Race Track parking lot located off the Reservation;

12. That during the Summer of 1992, I attended an official Little Six, Inc., function for all employees at the Valleyfair Amusement Park located off the Reservation in Shakopee, Minnesota;

13. That during 1992, 1993 and 1994, I have seen and/or heard newspaper and radio advertisements from Little Six, Inc., for their "Job Fairs." These Job Fairs are designed to find large numbers of potential Casino employees from the general public. Upon information and belief, the Job Fairs have been held at the Bloomington Mariott, Radisson South and other locations off the Reservation;

14. That I am aware that during 1992, 1993 and 1994, Little Six, Inc., advertised on radio, television and in the newspaper for Casino patrons; and

15. That during the time I worked for Little Six, Inc., I had numerous contacts with the Little Six, Inc., Chairman of the Board, Leonard Prescott, at locations outside the boundaries of the Reservation.

Further your Affiant saith not.

Dated: December 5, 1994

/s/ Jill Gavle
Jill Gavle

Subscribed and sworn to before me
this 5th day of December, 1994.

/s/ Diane M. Brustad [SEAL]
Notary Public

EXHIBIT A

SECURITY

Applicant must be a law enforcement program student any age or P.O.S.T. Certified & have successfully compleled first aid training. Start at $7.00/hour plus good benefits. Full & part time evenings & weekends. For more information & an interview appointment call Personnel Dept at 496-3544.

Little Six, Inc.

1244 Canterbury Rd
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A DIVISION OF LITTLE SIX INC.

Supreme Court, U.S.
FILED
MAR 3 1997
CLERK

No. 96-1215

In The

Supreme Court of the United States

October Term, 1996

JILL GAVLE,

Petitioner,

v.

LITTLE SIX, INC., A FOREIGN CORPORATION d/b/a MYSTIC LAKE CASINO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent Little Six, Inc. ("LSI") is a wholly-owned tribal entity of the Shakopee Mdewakanton Sioux (Dakota) Community ("Community"), a sovereign Indian tribe, federally-recognized and organized under the provisions of the Indian Reorganization Act of 1934 (48 Stat. 984) 25 U.S.C. § 476, *et seq.* LSI operates the Shakopee Community's gaming enterprises for the welfare of the Shakopee Community and its members. All of the Shakopee Community's gaming operations are conducted on trust land, as required by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA").

Petitioner was employed by LSI as a security guard from March, 1992 to February, 1993. (Petitioner's App., 70). Petitioner's job duties were primarily performed at the Shakopee Community's gaming enterprises on federal trust land, and none of the harms which Petitioner alleges to have been caused by LSI took place off of the trust land. *Id.*

Petitioner commenced her action in Scott County District Court in the State of Minnesota. The District Court dismissed the action, holding that LSI, as an entity of the Shakopee Community, was protected by the Shakopee Community's sovereign immunity from suit, and finding that LSI had not waived that immunity. (Petitioner's App., 55).

The District Court's decision was appealed by Petitioner to the Minnesota Court of Appeals, which affirmed the District Court's decision. (Petitioner's App., 30); *Gavle v. Little Six, Inc.*, 534 N.W.2d 280 (Minn. Ct. App. 1995).

The Minnesota Supreme Court subsequently granted Petitioner's request for review.

The Minnesota Supreme Court issued its opinion on October 31, 1996, holding that because LSI is so integrally intertwined with the Shakopee Community's governing structure, it is protected by the Shakopee Community's sovereign immunity from suit, and that LSI had not waived its immunity. (Petitioner's App., 1); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996).

ARGUMENT

I. THE MINNESOTA SUPREME COURT CORRECTLY FOUND THAT LITTLE SIX, INC. IS PROTECTED BY SOVEREIGN IMMUNITY FROM SUIT.

Petitioner argues that the decision of the Minnesota Supreme Court, that LSI is protected by the Shakopee Community's sovereign immunity from suit for off-reservation conduct, and that LSI has not waived its immunity, is in conflict with governing precedent. Petitioner is mistaken; the precedent upon which the Minnesota Supreme Court relied soundly supports the conclusion that tribal sovereign immunity extends to tribal entities, even for acts outside the borders of the tribe's reservation, and that LSI has not waived its immunity.

A. Tribal sovereign immunity from suit protects tribal entities such as LSI for off-reservation commercial activities.

This Court has stated that an Indian tribe's privileges and immunities do not turn on the particular form in which it chooses to conduct its business, and has treated tribal business enterprises as possessing the same immunities as the tribe itself, *Central Machinery Co. v. Arizona Tax Comm'n*, explaining that "it is irrelevant that the sale was made to a tribal enterprise rather than to the tribe itself." 448 U.S. 160, 164 n.3 (1980) (internal citations omitted). There is no distinction between LSI and the Shakopee Community that operates to divest LSI of its sovereign immunity from suit.

1. Tribal sovereign immunity protects tribal entities from suit.

As governments pre-dating the United States, Indian tribes possess "inherent powers of a limited sovereignty which has never been extinguished," *United States v. Wheeler*, 435 U.S. 313, 322 (1978), *citing* Felix Cohen, *Handbook of Federal Indian Law*, 122 (1945), and continue to possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). Tribal sovereign immunity shields a tribe's agencies, instrumentalities and enterprises from suit absent a clear and unequivocal waiver of that immunity. *Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). These principles have been applied to tribally-chartered housing authorities, *Weeks Constr. Inc. v. Oglala*

Sioux Housing Auth., 797 F.2d 668, 670-1 (8th Cir. 1986), and tribally-owned businesses. *In re Greene v. Richardson*, 980 F.2d 590 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 681 (1994).

Furthermore, like other sovereigns, Indian tribes have the power to cloak corporations which they create, own, and manage with the mantle of sovereign immunity. *Namekagon Dev. Co., Inc. v. Bois Fort Reservation Housing Auth.*, 395 F. Supp. 23, 26 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975) (Applying law of federal corporations to resolve question of tribal corporation's immunity from suit) (internal citations omitted). In fact, the bulk of authority, both federal and state, provides that tribal corporations *are* protected by tribal sovereign immunity from suit.[1]

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[1] *See, e.g., In Re Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc.*, 658 N.E.2d 989 (N.Y. 1995) (holding that sovereign immunity of the St. Regis Mohawk Tribe extended to the St. Regis Mohawk Education and Community Fund, a non-profit, state-chartered corporation); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993) (holding that tribal sovereign immunity protected manufacturing corporation incorporated by the Fort Totten Sioux Tribe under tribal law, but finding the tribe had waived that immunity); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 874 F.2d 550 (8th Cir. 1989) (holding that tribal corporation was protected by sovereign immunity, but finding waiver of immunity in contract); and *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir.), *cert. denied sub. nom. Willingham v. Sac & Fox Nation*, 116 S. Ct. 57 (1995) (holding that tribal corporation is protected by the tribe's sovereign immunity from suit, even for off-reservation economic activity).

2. Little Six, Inc. is controlled by the Shakopee Community's government, and cannot function as a separate entity.

Petitioner does not dispute that Indian tribes are protected by sovereign immunity from suit, yet would deny that protection to LSI, arguing that LSI is a "separate and distinct corporation." (Petition, 15). Yet the Minnesota Supreme Court determined that "there is simply no way to avoid the fact that LSI is different from other corporations," concluding that "it is integrally related to the . . . Shakopee Community" as to be indistinguishable from it. *Gavle*, 555 N.W.2d at 295-296. In reaching its conclusion, the Minnesota Supreme Court examined the purposes for which LSI was formed, the extent to which LSI is linked to the Shakopee Community's governing structure, and whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity. *Id.* at 294. The Minnesota Supreme Court determined all three factors weighed in favor of LSI's sovereign immunity protection.

As this Court determined in *California v. Cabazon Band of Mission Indians*, Indian gaming is a means by which Indian "tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination." 480 U.S. 202, 217-18 n.21 (1987). Further, when Congress enacted the IGRA, it did so "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. LSI was formed for a uniquely governmental purpose: to operate the Shakopee

Community's gaming enterprises for the express purposes of "improv[ing] the business, financial or general welfare of the Corporation, the Members of the Corporation, and the Shakopee Community." (App. 2). Both the general and specific purposes for which LSI was formed require finding that it is a tribal entity, possessing sovereign immunity from suit.

LSI is not, as the Petitioner implies, a management entity separate from the Shakopee Community. (Petition, 19 n.7). LSI is *wholly-owned* by the Shakopee Community. (App. 32-33). All members of the Shakopee Community's General Council, its governing body, have voting rights contemporaneous with voting rights as a member of the General Council (App. 3). Shakopee Community Members' voting rights may not be transferred, nor may Members transfer their beneficial interests in LSI. (App. 4, 33).

Further, the manner in which LSI must act to fulfill the purposes for which it was formed, and the matters over which the General Council has authority, demonstrate the extent to which LSI is a part of the Shakopee Community government. The General Council holds authority to approve the encumbrance of any and all interests in real trust property and to approve the purchase of real trust property. (App. 30). The General Council must approve the annual budget (App. 75), expenditures in excess of the levels in the annual budget (App. 75), and the sale of corporate assets with an aggregate value in excess of $500,000. (App. 75). Further, all net profits and dividends must be paid monthly to the Community.

Not only does the General Council have financial control over LSI, but it also has control over corporate structure. The General Council must approve the formation of a partnership with another corporation, the creation of a joint venture, the purchase of another existing corporation, merger with another corporation, and the enactment of amendments to the Articles of Incorporation or the Corporate Bylaws. (App. 75).

Further, LSI's Board of Directors must include the Shakopee Community's Business Council, which is analogous to the executive branch of the federal government. (App. 8). And ultimate control over LSI clearly resides with the Shakopee Community's governing body, the General Council, for it can require the Board of Directors to take any action deemed in the Shakopee Community's best interest. (App. 75-76).

Therefore, LSI is an entity of the Shakopee Community which exercises governmental powers for the purposes of conducting gaming, and is not a separate, independent corporation as Petitioner implies. LSI is operated to promote the economic independence, self-sufficiency, and self-government of the Shakopee Community. It is beyond question that the Shakopee Community governs LSI, manages LSI, and controls all aspects of LSI's existence.

3. The Shakopee Community's sovereign immunity protects Little Six, Inc. from suit.

Because LSI shares the sovereign immunity of the Shakopee Community, an explicit affirmative act is necessary to waive the Shakopee Community's immunity from

suit; it need not so act to preserve it. The Shakopee Community's law specifically permits the Shakopee Community to vest its sovereign immunity in a corporation that is both chartered and wholly-owned by the Shakopee Community. (App. 29). The Ordinance recites, in pertinent part

> A corporation wholly owned by the Community may assume any or all of the Community's rights, privileges and immunities *(including without limitation, sovereign immunity) . . . to the same extent that the Community would have such rights, privileges and immunities if it engaged in the activities undertaken by the Corporation.*

Id. (emphasis added). Pursuant to that authority, the Community, in the Articles of Incorporation that it issued to LSI, explicitly conferred its sovereign immunity on that enterprise. The extension of the Community's immunity to LSI is set out in Article 3 of the company's Articles of Incorporation, which recites:

> 3.1 *Sovereign Immunity of Corporation.* The Shakopee Mdewakanton Sioux Community confers on the Corporation *all of the Community's rights, privileges, and immunities concerning* federal, state and local taxes, regulation, and jurisdiction, and *sovereign immunity from suit,* to the same extent that the community would have such rights, privileges and immunities if it engaged in the activities undertaken by the corporation.

(App. 2) (emphasis added).

Tribes are clearly free to choose the forms in which they wish to conduct their business. *Mescalero Apache*

Tribe v. Jones, 411 U.S. 145, 157 n.13 (1973). As a sovereign, the Shakopee Community is free to choose the form in which it conducts *its* business, including its gaming activities. As a sovereign, the Shakopee Community has the power to vest its immunity from suit upon an entity that it owns and which functions to promote the Community's welfare through gaming. Little Six shares the Shakopee Community's immunity from suit.

4. The Shakopee Community's sovereign immunity from suit extends to off-reservation commercial activity.

The Shakopee Community's sovereign immunity does not stop at its reservation borders, for tribes are immune from suit for commercial activities which arise inside *and outside* of Indian country.[2] In *Sac & Fox Nation v. Hanson*, the Sac and Fox Nation sued the state of Oklahoma to prohibit it from enforcing injunctions

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[2] While the locus of the harm should not be the dispositive factor in determining the extent of sovereign immunity protection afforded Indian tribes and the entities through which they conduct their affairs, this Court should note that Petitioner can point to nothing in the record of the proceedings below that establishes that LSI acted off the Shakopee Community's trust land in any way that even allegedly harmed Petitioner. While Petitioner alleges defendant Prescott acted off the Shakopee Community's trust lands in ways that harmed her, there is nothing of record that establishes Prescott's acts as those of either the Shakopee Community or LSI. Consequently, much of Petitioner's argument is entirely beside the point, for to the extent that there has been no activity harmful to Petitioner off of trust lands, any discussion of tribal off-reservation protection from sovereign immunity is superfluous.

against it in state court in matters in which the Nation was a third-party defendant. 47 F.3d 1061. Oklahoma claimed that "the Nation [was] not entitled to sovereign immunity because the commercial activity at issue took place outside the Nation's reservation." *Id.* at 1064. The Court found that the location of the commercial activity was not determinative. *Id.* It concluded that "[w]ithout an explicit waiver, the Nation is immune from suit in state court – even if the suit results from commercial activity occurring off the Nation's reservation." *Id.* at 1065.

The Ninth Circuit upheld the principle that tribal extra-territorial immunity is still the rule of law, even where a tribe is engaged in off-reservation commercial activity, and that absent an express, unequivocal waiver of a tribe's sovereign immunity from suit, an exercise of subject matter jurisdiction by *any* court is precluded. *In re Greene*, 980 F.2d 590. LSI has not waived its sovereign immunity from suit, and its sovereign immunity protects it from suit, even for off-reservation acts.

B. Decisions regarding the extent of tribal immunity from taxation are an insufficient basis upon which to abrogate tribal sovereign immunity.

Like the Shakopee Community's sovereign immunity, LSI's sovereign immunity from suit extends to its activities both on and off of the Shakopee Community's lands. Yet Petitioner relies on *Mescalero Apache*, 411 U.S. 145, and *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. ___, 115 S. Ct. ___, 132 L.Ed.2d 400 (1995), to argue that LSI is not entitled to sovereign immunity for off-reservation activities. (Petition 5-9). Petitioner's reliance is misplaced,

for tribal immunity from state taxation, and tribal sovereign immunity from suit are distinguishable, and none of the cases cited by Petitioner supports abrogating tribal sovereign immunity.

The difference between tribal tax immunity and tribal sovereign immunity is best illustrated by *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991). There, the Supreme Court found that the tribe was not immune from the imposition of an Oklahoma cigarette tax on cigarettes sold by the tribe in its convenience store. *Id.* But the court still held that sovereign immunity

> prevented the state from collecting the tax on sales to tribal members and from suing the Tribe to collect amounts due. Even though tribal sovereignty did not prevent the state from imposing a duty to collect the tax on the Tribe, tribal immunity prevented the state from suing to collect the amounts due.

Potawatomi, 498 U.S. at 512.

Further, the presumption that applies in the context of taxation is the reverse of that which applies in the context of tribal sovereign immunity. In the context of taxation, "this Court has repeatedly said that tax exemptions are not granted by implication . . . . It has applied that rule to taxing acts affecting Indians as to all others . . . . " *Mescalero Apache*, 411 U.S. at 156. Consequently, unless there is an *express exemption* that is provided by federal law or a treaty, state tax for off-reservation activity will apply to sales made by an Indian tribe. Felix Cohen, *Handbook of Federal Indian Law*, 430 (1982 ed.).

The presumption in the context of sovereign immunity, however, is the reverse. "Indian tribes have always been considered to have an immunity from suit," *Namekagon Dev.*, 517 F.2d at 510, and tribal sovereign immunity is presumed to protect the tribe from suit unless waived either by the tribe itself or by Congress, *Potawatomi*, 498 U.S. 505, even for commercial activity outside Indian country. *Sac & Fox Nation*, 47 F.3d 1061. Further, in order to overcome the presumption that sovereign immunity protects a tribal entity from suit, a party must make a showing that a tribe has *unequivocally expressed* a waiver of its sovereign immunity from suit, for this Court has consistently held that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58; *United States v. Testan*, 424 U.S. 392, 399 (1976).[3] Further, "any waiver of immunity is to be interpreted liberally in favor of the tribe and restrictively against the claimant." *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376, 1381 (Ariz. App. 1983), *citing Maryland Casualty Co. v. Citizens Nat'l. Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966).

State taxes are not at issue here, and the cases cited by Petitioner are an insufficient basis upon which to abrogate tribal sovereign immunity. There has been no

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[3] Petitioner also cites to *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), in support of her argument, but that case is entirely inapposite. In *Kake*, the issue was the authority of the state of Alaska to regulate off-reservation fishing by members of an Alaskan Native Village, and the case did not address sovereign immunity from suit.

express, unequivocal waiver of LSI's sovereign immunity from suit, and even though Petitioner can cite to nothing in the record below which substantiates that LSI committed any act off trust land harmful to Petitioner, if LSI had, LSI's sovereign immunity would protect it from this suit, for its sovereign immunity extends to off-reservation acts.

C. The Minnesota Supreme Court's decision regarding sovereign immunity of tribal corporations is in accord with decisions of both state and federal courts.

The decision of the Minnesota Supreme Court is in accord with the decisions of both federal and state courts, yet, as a basis for grant of the Petition, Petitioner attempts to rely on a purported conflict between the federal circuit courts and state courts regarding the extent of off-reservation protection afforded to tribal commercial enterprises by sovereign immunity. (Petition, 14-21). There is no conflict between state and federal court decisions, as they pertain to this case, which requires resolution by this Court.

Virtually all state courts addressing the issue have held, as have most federal courts, that absent an unequivocally expressed waiver, a proprietary entity established by a tribal government is protected by the tribe's sovereign immunity for commercial activities taking place on the tribe's reservation, whether the claim is based on contract or negligence theory. *E.g., S. Unique, Ltd.*, 674 P.2d 1376. Sovereign immunity has also been held to prevent suit in a state court for a contract claim involving a tribal corporation, *Robles v. Shoshone-Bannock Tribes*, 867

P.2d 134 (Idaho 1994) (holding that sovereign immunity protected tribal corporation unless expressly waived), and to a non-profit corporation chartered pursuant to the laws of the District of Columbia, and registered with the state of New York to conduct business off the reservation. *Ransom*, 658 N.E.2d 989. Similarly, in *DeFeo v. Ski Apache Resort*, the New Mexico Court of Appeals held that the tribe was immune from the suit of a guest at its ski resort for injuries allegedly sustained due to the tribe's negligence. 904 P.2d 1065 (N.M. Ct. App. 1995). The Minnesota Supreme Court's decision is in full accord with these decisions.

The purported conflict between state and federal law on this issue stems from the fact that federal circuit courts addressing the issue have held that off-reservation commercial activity by Indian tribes is protected by sovereign immunity from suit, *In re Greene*, 980 F.2d 590,[4] while the supreme courts of two states have held that off-reservation commercial activity of an Indian tribe is not protected by sovereign immunity from suit. The New Mexico Supreme Court in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1028 (1989), relying on the reasoning in *Nevada v. Hall*, 440 U.S. 410 (1979) (holding that Nevada could be sued in California courts), held the Pueblo could be sued in New Mexico courts. The *Padilla* court reasoned that because New Mexico could be sued to enforce a contract, and because the Pueblo was

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[4] *See also Romanella v. Hayward*, 933 F. Supp. 163 (D. Conn. 1996) (holding that tribe's sovereign immunity protected it from tort based claim resulting from off-reservation commercial activity).

engaged in off-reservation commercial activity, it was not protected by sovereign immunity from a contract-based claim. *Padilla* has been soundly criticized.[5]

The Oklahoma Supreme Court in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), and in *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996), also held that Indian tribes engaged in off-reservation commercial activity were not protected by sovereign immunity from suit, relying on the reasoning of *Padilla*. These cases are not a basis for granting the Petition, for the sovereign immunity of Indian tribes is not a matter of state law. Even the *Padilla* court noted, "[a]bsent federal authorization, tribal immunity is privileged from diminution by the states." *Padilla*, 754 P.2d 847. *Padilla* is of

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[5] *E.g.*, *In re Greene*, 980 F.2d at 595 ("The [*Padilla*] court should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law."); *Romanella v. Hayward*, 933 F. Supp. at 167 ("The court finds the reasoning of *In re Greene*, and its criticism of *Padilla*, persuasive and holds that the Tribe's immunity from suit extends to commercial activities occurring off the reservation."); *Elliott v. Capital Int'l. Bank & Trust*, 870 F. Supp. 733, 734 (E.D. Tex. 1994) ("The court's research has led it to the conclusion that the *Padilla* approach is generally rejected outside the courts of that state."); and *DeFeo v. Ski Apache Resort*, 904 P.2d at 1069 ("[W]e [ ] recognize that, in concluding that business conducted by a sovereign Indian tribe off its reservation is not clothed with immunity from suit in state courts, *Padilla* appears to conflict with the Tenth Circuit's more recent holding in *Sac & Fox Nation*, which clearly stated that the location of the commercial activity was not determinative and held that an Indian tribe was immune from suit in state courts 'even if the suit results from commercial activity occurring off the [Indian tribe's] reservation.' ")

limited utility to Petitioner, for it is clearly a minority position, adhered to only by Oklahoma, for even the New Mexico courts have signalled that they may be prepared to re-examine the validity of the holding there. *DeFeo v. Ski Apache Resort*, 904 P.2d at 644.

In contrast, Arizona has held that absent an unequivocally expressed waiver, tribes are protected by sovereign immunity for contract or tort claims based on off-reservation commercial activity. *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968). In *Morgan*, the Arizona Supreme Court held that Indian tribes cannot be subject to the jurisdiction of state courts except where there has been an express waiver of the tribe's sovereign immunity from suit. 443 P.2d 421 (wrongful death action against the Tribe, as the owner and operator of the resort located entirely off the Tribe's reservation and catering to an almost exclusively non-Indian clientele, dismissed based on absence of waiver of the Tribe's sovereign immunity from suit). The *Morgan* Court said "[i]t is clear that Congress alone must determine the extent to which immunities afforded tribal status are to be withdrawn." *Id.* at 424.

Federal circuit courts have also held that off-reservation commercial activity by a corporate entity of the tribe is protected by tribal sovereign immunity from suit. *Sac & Fox Nation*, 47 F.3d 1061.[6] And in addition to the case at bar, other state supreme court decisions concur with the federal decisions regarding the extent to which tribal

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[6] *See also Elliott v. Capital Int'l. Bank & Trust*, 870 F. Supp. 733 (tribally-chartered bank operating off-reservation protected by tribe's immunity from suit).

sovereign immunity protects a tribally-owned corporation for off-reservation activity. The Washington State Supreme Court held that the tribe's sovereign immunity protected an operating division of a corporate entity chartered under the tribe's constitution, and stated that "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed," and that absent such an unequivocally expressed waiver, off-reservation activity did not subject the tribe to the jurisdiction of the state courts. *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938, 941 (Wash. 1979). The case was accordingly dismissed.

The only state supreme court opinion declining to extend tribal sovereign immunity protection to off-reservation commercial activity by a tribally-chartered corporation is not inconsistent with the decision at issue here. In *Dixon v. Picopa Constr. Co.*, the Arizona Supreme Court declined to extend tribal sovereign immunity to the off-reservation commercial activity of Picopa Construction Co. because the construction company was deemed not to be an economic organization subordinate to the tribal government. 772 P.2d 1104 (Ariz. 1989). Even though the "subordinate economic entity" test established by the *Dixon* court is clearly a minority interpretation, LSI meets it, and is immune from Appellant's claims, for all LSI's activities are directed at promoting Community interests, and, pursuant to Community decisional law, are actions of the tribal government. As the *Gavle* court correctly concluded, there is simply no way to avoid the fact that LSI *is* subordinate to the Community government, and is so integrally related to the Shakopee Community that it is

a part of the Community's government, protected by the Community's sovereign immunity from suit.

II. NO COURT HAS EVER HELD THAT REGISTRATION AS A FOREIGN CORPORATION IS A WAIVER OF SOVEREIGN IMMUNITY.

Petitioner concedes that to validly waive its sovereign immunity from suit, LSI must do so unequivocally, but she then suggests that LSI has waived its immunity through registration as a foreign corporation with the State of Minnesota. Because no court has ever held that registration as a foreign corporation is a waiver of sovereign immunity, there is no need for the Court to accept review on this issue. Moreover, to the extent that Petitioner is asking this Court to interpret Minnesota law, the Court is without jurisdiction to consider the matter.

Petitioner argues that as a matter of Minnesota law, LSI consented to be bound by the laws of Minnesota when it registered to do business as a foreign corporation. Because this Court is restricted by the United States Constitution from hearing issues arising solely as a matter of state law, however, Petitioner cannot obtain review on that issue. U.S. Const. art. III.

Petitioner's other argument on this point is that the Minnesota Supreme Court's conclusion that the consent to service of process was not an unequivocally expressed waiver of sovereign immunity contradicts federal case law. (Petition, 21). Specifically, Petitioner claims that the Minnesota court's finding that consent to service of process was not an abrogation of all affirmative defenses conflicts with two Alaska cases finding that an agreement

to be bound by arbitration is a waiver of sovereign immunity. (Petition, 28), *citing Hydaburg Coop. Assoc. v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992), and *Neana Fuel Co., Inc. v. Native Village of Venetie*, 834 P.2d 1229, 1233 (Alaska 1992). In those cases, she argues, the Alaska Supreme Court implicitly concluded that all affirmative defenses had been waived by entering the agreement. What Petitioner fails to recognize is that agreeing to enter arbitration is wholly distinct from consenting to service of process.

By agreeing to arbitration, a party is agreeing to a form of *dispute resolution*. (And agreeing to have one's dispute resolved by a particular forum could arguably be characterized a waiver of sovereign immunity.) By contrast, consenting to service of process is simply agreeing that a particular forum will have personal jurisdiction over the party giving consent. *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990). It could be nothing more, for while "[a] party beyond the reach of a federal court's process may voluntarily submit to its jurisdiction over his person, . . . he cannot create subject-matter jurisdiction. . . . " *Finley v. United States*, 490 U.S. 545, 559 (1989).

Petitioner suggests that every party who signs a Minnesota consent to service of process creates subject matter jurisdiction in the Minnesota courts. According to Petitioner, LSI "waived all *jurisdictional defenses*" by completing the consent to service of process. (Petition, 26). Petitioner's argument is self-defeating, because not all jurisdictional defenses *can* be waived: "[N]o action of the parties can confer subject-matter jurisdiction on a federal court." *Insurance Corp. v. Compagnie des Bauxites*, 567 U.S.

694, 702 (1982). *See also North Central Services, Inc. v. Eastern Communications, Inc.*, 379 N.W.2d 708, 710 (Minn. Ct. App. 1986) ("Unlike subject matter jurisdiction, which can never be waived, personal jurisdiction may be given by consent of the parties.").

Petitioner's final argument is that the Minnesota Supreme Court incorrectly relied on *Ransom*, 658 N.E.2d at 993. In *Ransom*, the tribally-owned Fund's corporate charter incorporated the District of Columbia's Non-Profit Corporation Act. The Act states that a corporation formed thereunder "shall have power . . . [t]o sue and be sued, complain and defend, in its corporate name. . . . " The corporate charter did not, however, contain any express waiver of sovereign immunity. The petitioners urged the New York Court of Appeals to find that incorporation under the District of Columbia's Non-Profit Corporation Act created consent to suit in a state court. A unanimous Court of Appeals squarely rejected this contention, and held that "the mere fact that a tribal corporation, by statute, has designated an agent for service of process or is empowered to 'sue and be sued' does not automatically subject that corporate entity to any court's jurisdiction where jurisdiction is otherwise lacking." *Id.* at 995. Petitioner argues that because the Minnesota Court found that it had subject matter jurisdiction, its reliance on *Ransom* was misplaced. But the next sentence of the *Ransom* opinion makes clear that the "where jurisdiction is otherwise lacking" language referred to the lack of a waiver from suit: "In other words, the general powers provisions of the corporation statutes are not self-executing, and express n[illegible]tion of the power to sue

and be sued and submission to a particular forum by official tribal action is required." *Id.*

Consent to service of process is not a submission to a particular forum. *Snow v. Quinalt Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984). Even if this Court had jurisdiction to consider whether under Minnesota law consent to service was a consent to state court jurisdiction, the result would be "perfectly clear" because "an act of a state legislature cannot be allowed to interfere with the guardianship over [Indians] which the United States has assumed, since Congress alone must determine the extent to which the immunities and protection afforded by tribal status are to be withdrawn." *Haile v. Saunooke*, 246 F.2d 293, 297 (4th Cir. 1957) (holding tribe immune from suit for personal injury suit arising from collapse of bridge on tribe's reservation). Petitioner's argument regarding LSI's consent to service of process is much ado about nothing. No split of authority exists. Simply put, Petitioner was unable to demonstrate that *any court* has *ever held* that consent to service of process is an unequivocally expressed waiver of tribal sovereign immunity.

III. IN THE ABSENCE OF A TRIBAL WAIVER, ONLY CONGRESS CAN ABROGATE TRIBAL SOVEREIGN IMMUNITY, AND IT HAS NOT DONE SO IN THIS CASE.

Petitioner's primary argument for granting certiorari is policy-based. She contends that it is unfair that an Indian tribe has the authority to confer its governmental

sovereign immunity to its sub-entities, particularly corporations. (*E.g.*, Petition, 7-10). How, she asks, can it be that Congress requires foreign sovereigns to be subject to suit for commercial activity but has not done so for Indian tribes? It is not this Court's province, however, to answer a policy question such as Petitioner poses.

Petitioner goes so far as to argue that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, applies to Indian tribes because there is no exception for "sovereign Indian tribes or corporations owned by Indians under the Act." (Petition, 10).[7] Though some courts have, as Petitioner notes, expressed doubts about the *policy* behind the doctrine of sovereign immunity, no Court has ever held the that the FSIA applies to Indian tribes or their corporations. In fact, one Circuit Court of Appeals used the FSIA to demonstrate why courts have no authority over tribal sovereign immunity.

In *In re Greene*, the Ninth Circuit noted that "[f]rom Congress' adoption of the [FSIA], we can imply at least two things: a. It takes an act of Congress to effectively limit the sovereign immunity of a foreign sovereign; and b. Congress knows how to limit the sovereign immunity of others when it wants to." 980 F.2d at 594 n.3. Because no act of Congress has limited the sovereign immunity of

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[7] The absurdity of Petitioner's argument in this regard is demonstrated by the plain language of the U.S. Const., art. I, § 8, which distinguishes Indian tribes from foreign nations when it sets forth that Congress shall have authority to "regulate commerce with Foreign Nations . . . and with Indian tribes." Congress enacted the FSIA as an exercise of its authority to regulate commerce with foreign nations. It did not invoke its authority to regulate commerce with Indian tribes.

the Shakopee Community or LSI in this instance, no court could find that LSI is unprotected from Petitioner's suit in state court, no matter what its views on the *policy* behind tribal sovereign immunity.

A. All courts agree that absent an express tribal waiver of sovereign immunity, only an Act of Congress can waive tribal immunity from suit.

For more than one hundred years, state and federal courts have recognized that only Congress can abrogate tribal sovereign immunity. In an action to recover attorney's fees from the Choctaw Nation, the Eighth Circuit noted that "[w]hile the Nation has many of the attributes of the political unit which constitutes the civil and self-governing community called a 'State' or a 'Nation,' it is not a sovereign state, but it is a domestic and dependent state, subject to the jurisdiction and authority of the United States. Being a domestic and dependent state, the United States may authorize suit to be brought against it." *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 374 (8th Cir. 1895). Forty-five years later, this Court reaffirmed Congress's authority: "These Indian Nations are exempt from suit without Congressional authorization." *United States v. United States Fidelity & Guar.*, 309 U.S. 506, 512 (1940).

This Court has consistently upheld tribal sovereign immunity since then, and has continuously recognized that absent a tribal waiver, only Congress can abrogate tribal sovereign immunity. Indeed, as the Court noted, "Congress has always been at liberty to dispense with such tribal immunity or to limit it." *Potawatomi*, 498 U.S.

at 510. In this Court's seminal case on tribal sovereign immunity, the Court held that without explicit Congressional authorization, federal courts could not hear disputes arising under the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty is subject to the superior and plenary control of Congress. But 'without Congressional authorization,' the 'Indian Nations are exempt from suit.' " *Santa Clara Pueblo,* 436 U.S. at 58 (1978) (citations omitted).

Given Congress's plenary authority in this area, the Minnesota Supreme Court reached the only possible result in this case – it found LSI immune from suit. As the Alaska Supreme Court concluded, "Because of the supremacy of federal law, [state courts] are bound to recognize the doctrine of tribal sovereign immunity, even if [they] were to find valid public policy reasons to hold it inapplicable. . . . " *Atkinson v. Haldane,* 569 P.2d 151, 163 (Alaska 1977) (finding Indian community immune from suit in wrongful death action). Even the state cases on which Petitioner relies have recognized that in the absence of a tribal waiver, Congress alone has the authority to undo tribal sovereign immunity. For example, in *Padilla,* the New Mexico Supreme Court acknowledged that "[w]here a tribe's sovereign immunity obtains, it is well-settled and binding upon this Court that only under congressional consent of an effective waiver may a state

court exercise jurisdiction over a recognized tribe." 754 P.2d at 847.[8]

Because "[i]t is clear that Congress alone must determine the extent to which immunities afforded tribal status are to be withdrawn," *Morgan*, 443 P.2d at 424, even if this Court were to agree with Petitioner's policy arguments regarding tribal sovereign immunity, granting certiorari in this case would be of no help to Petitioner. Congress has not abrogated LSI's immunity in this instance.

B. Congress has not abrogated LSI's sovereign immunity from suit.

To paraphrase the Ninth Circuit, Congress knows how to limit the sovereign immunity of Indian tribes when it wants to. *In re Greene*, 980 F.2d at 594. For example, in order for Indian tribes to obtain confidential information regarding oil or gas royalty management, Congress requires that an Indian tribe waive "sovereign immunity by express consent for wrongful disclosure" of the information by the tribe. 30 U.S.C. § 1733 (1996). And in order to solve land disputes between the Navajo and Hopi Tribes, Congress authorized each tribe "to commence or defend in the District Court an action against the other tribe and any other tribe of Indians" claiming interest in the disputed lands. 25 U.S.C. § 640d-7 (1996).

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[8] As Petitioner points out, the New Mexico Court found that Pueblo of Acoma was not immune from suit in *Padilla* because it was engaged in commercial activity off the Reservation. As discussed in note 5, *supra*, that result has been widely criticized.

In this instance, however, Congress has neither required nor effected a waiver of LSI's immunity.

Those opposed to the doctrine of tribal sovereign immunity have pleaded with Congress on several occasions to do away with it, either partially or in full. In the wake of the *Santa Clara Pueblo* decision, at least two bills were introduced to abrogate tribal sovereign immunity in federal courts for Indian Civil Rights Act claims. *E.g.*, S. 2747, 100th Cong. 2d Sess. (1988); S. 517, 101st Cong. 1st Sess. (1989). Congress declined to pass either of them. More recently, a waiver of tribal sovereign immunity was proposed as part of the Senate Interior Appropriations Subcommittee Markup of the FY 1997 Interior appropriations bill. That proposal was withdrawn before it made it to the floor of the Senate. Section 329 of Senate Interior Appropriations Committee Markup of H.R. 3662, 104th Cong., 2d Sess. (1996).

Rather than abrogating tribal sovereign immunity – which would be an abrogation of tribal sovereignty itself – Congress has consistently supported tribal self-government, and protected tribal sovereignty.[9] Indeed, this Court has

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[9] *See, e.g.*, Indian Tribal Justice Act, 25 U.S.C. § 3601, *et seq.*; Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, *et seq.* (committing the United States to supporting and assisting Indian tribes in "the development of strong and stable tribal governments"); Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* (declaring that a principal goal of federal Indian policy is "to promote tribal economic development, tribal self-sufficiency, and strong tribal government"); Native American Languages Act, 25 U.S.C. § 2901, *et seq.* (recognizing "the United States policy of self-determination for Native Americans"); and Indian Trust Fund Management Reform Act

> repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. *See, e.g. Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144, and n. 10 (1980); *Williams v. Lee*, 358 U.S. 217, 220-221 (1959). This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), to the extent that sovereignty has not been withdrawn by federal statute or treaty.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) (footnote omitted). In the face of consistent Congressional support for tribal sovereignty and tribal sovereign immunity, granting certiorari here would be to no avail. Because LSI possesses sovereign immunity from suit, absent a tribal waiver, only Congress could give Petitioner the relief she seeks – a right to have her case heard in state court.

LSI hesitates to engage Petitioner in a policy debate, but must point out to the Court that the Minnesota Supreme Court's decision does not "allow off-reservation business to be conducted in the State of Minnesota (or anywhere else) with total immunity." (Petition, 19). First, as noted at the outset of this response, LSI conducts its business within Indian Country. Second, "the plaintiff is

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of 1994, 25 U.S.C. § 4001, *et seq.* (promoting tribal management of tribal funds in order to "demonstrate how the principles of self-determination can work with respect to the management of such trust funds").

free to seek a remedy in a tribal forum, if tribal law provides such a remedy." *Federico v. Capital Gaming Int'l.*, 888 F. Supp. 354, 357 (D. R.I. 1995) (noting that holding tribe was immune from suit in federal court is not the "equivalent of allowing the Tribe to abrogate unilaterally a contract."). The Shakopee Community has adopted a Tort Claims Ordinance wherein it has waived its sovereign immunity and the sovereign immunity of its corporations for tort claims brought in Tribal Court. (App. 81).[10] The Minnesota Supreme Court's decision accords the proper respect owing a sovereign tribal government in the absence of Congressional direction to the contrary, and there is no reason (nor any authority) for this Court to take up Petitioner's quest to re-write long-settled Congressional policy.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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[10] Petitioner's claims are time-barred under this ordinance, however. (App. 90).

ARTICLES OF INCORPORATION
OF
Little Six, Inc.

March 18, 1991

The Shakopee Mdewakanton Sioux Community, ("the Community") acting through its Business Council, hereby authorizes these Articles of Incorporation to be filed under the Shakopee Mdewakanton Sioux Community Business Corporation Ordinance for the purpose of creating a Tribal Corporation under Article V of the Constitution of the Shakopee Mdewakanton Sioux Community, as amended.

ARTICLE 1

1.0. *Name* The name of this tribally chartered Corporation is Little Six, Inc.

ARTICLE 2

2.0. *Duration* The period of existence of the Corporation shall be perpetual, except that the Corporation may have these Articles of Incorporation amended or restated or the Corporation may be dissolved in accordance with the Shakopee Mdewakanton Sioux Community Business Corporation Ordinance.

ARTICLE 3

3.0 *Purposes and Powers.* The purposes for which the Corporation is organized are to engage in any lawful act or activity for which corporations may be organized under the Shakopee

Mdewakanton Sioux Community Business Corporation Ordinance, provided that any and all activities of the Corporation shall seek to improve the business, financial or general welfare of the Corporation, the Members of the Corporation, and the Community.

3.1. *Sovereign Immunity of Corporation.* The Shakopee Mdewakanton Sioux Community confers on the Corporation all of the Community's rights, privileges and immunities concerning federal, state, and local taxes, regulation, and jurisdictional, and sovereign immunity from suit, to the same extent that the Community would have such rights, privileges, and immunities, if it engaged in the activities undertaken by the Corporation. Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.

3.2. *Consent to Sue and be Sued Required.* The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction; provided, however, that any recovery against the Corporation shall be limited to the assets of the Corporation delineated at Article 6 of these Articles of Incorporation, and that, to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent. Consent to suit by the Corporation shall in no way extend to the Community, nor shall a consent to suit by the Corporation in any way be deemed a waiver of any of

the rights, privileges and immunities of the Community. Consent shall not be required for an action commenced by a Member of the Corporation to enforce the provisions of these articles or the Shakopee Mdewakanton Sioux Community Corporation Ordinance in the Judicial Court of the Shakopee Mdewakanton Sioux Community.

3.3. *Purposes and Powers.* The purposes specified herein shall be construed as both purposes and powers.

ARTICLE 4

4.0. *Ownership and Members of the Corporation.* This corporation shall issue one share of stock which shall be wholly owned by the Community; the Community shall be issued a stock certificate evidencing such ownership. Each voting member of the Community ("Member of the Corporation") shall be issued a voting rights certificate evidencing the right of that member to one vote on any Corporation matter properly before the Members at any meeting of the Corporation; the voting rights of each Member of the Corporation shall be concurrent with the voting rights of that individual as a member of the Community; all laws applicable to such voting rights as members of the Community member as a Member of the Corporation. Any other beneficial interest or right in the Corporation shall be indivisibly held by and for the Community.

4.1. *Voting Certificates and Signatures.* Every voting member of the Community, as a Member of the Corporation, shall be entitled to a certificate stating the holder's name, describing the nature of the interest evidenced by the certificate, and bearing the signature of the Clerk of Court of the

Shakopee Mdewakanton Sioux Community and the Corporate seal.

4.2. *Transfers of Interest Forbidden.* The voting rights and interests of Members in the Corporation shall be personal rights held concurrently with the right of voting membership in the Community, and shall not be subject to sale, or transfer, devise or bequest. No assignment of voting rights or interests shall be valid, but Members of the Corporation may choose to vote by written proxy, as provided by Section 40.0 of the Shakopee Mdewakanton Sioux Community Corporation Ordinance.

4.3. *Time and Place of Meetings.* Meetings of the Members of the Corporation shall be held at the principal place of business or another location within 40 miles of the Shakopee Mdewakanton Sioux Community Center or corporate office at such time and place as the Board of Directors shall fix.

4.4. *Annual Meeting.* Annual meetings of the Members of the Corporation shall be at such time and place as the Board shall determine. In the event the Board fails to set the time and date of meeting, it shall be held on the first Tuesday of each year. At such annual meeting, Members of the Corporation shall transact such business as may properly be brought before the meeting.

4.5. *Notice of Meetings.* The Board of Directors shall notify Members of the Corporation of the date, time and place of any corporate meeting, except meetings of the Board of Directors, at least 5 days before the meeting. Notice need not be given to any Member of the Corporation who signs a waiver of notice. Notices shall be deemed to be effective if placed in the U.S. Mail, with

proper first class postage affixed, at least seven calendar days in advance of the date of the meeting.

4.6. *Special Members Meetings.* Any two members of the Board of Directors may call a special meeting of the corporation for any purpose or a meeting may be requested by a majority of the Members of the Corporation.

4.7. *Manner of Meetings.* Except as otherwise provided in these Articles, the Members of the Corporation may conduct regular or special meetings through the use of any means and procedures which are proper for meetings of the General Council of the Shakopee Mdewakanton Sioux Community. Balloting may be conducted in the manner proscribed for actions of the General Council of the Shakopee Mdewakanton Sioux Community, and Members may choose to vote by written proxy, as provided by Section 40.0 of the Shakopee Mdewakanton Sioux Community Corporation Ordinance.

4.8. *Presiding Officer.* The Chairman of the Board shall preside over the Corporation meeting.

4.9. *Records.* The Corporation shall keep at its registered office books in which shall be recorded the names and addresses of every Member, the names and residences of its officers and such other records and information as may be required by law.

4.10. *Inspection of Records.* A Member of the Corporation is entitled to inspect the corporate records during the usual and customary hours of business and in a manner that will not unduly interfere with the regular conduct of the business of the Corporation. Any such information so

obtained shall not be used to the competitive detriment of the Corporation.

ARTICLE 5

5.1. *Principal Place of Business.* The Corporation shall be a resident of and maintain its corporate headquarters on the Shakopee Mdewakanton Sioux Community Reservation in Prior Lake, Minnesota, but may conduct its business activities any place in or outside of the United States. The Corporation may have such other offices, either within or without the Shakopee Mdewakanton Sioux Community Reservation as the business of the Corporation may require from time to time.

5.2. *Mailing Address and Registered Agent.* The mailing address of the corporation's initial registered office is 2330 Sioux Trail N.W., Prior Lake, Minnesota, and the name of the initial registered agent at this address is Leonard Prescott.

ARTICLE 6

6.0. *Assets.* Subject to the contractual and sovereign rights of others, including the Shakopee Mdewakanton Sioux Community, the Corporation shall have as its corporate assets, and the authority to acquire, manage, own, use, pledge, encumber, or otherwise dispose of, the following:

6.1. All funds which the Corporation may acquire by grant, gift, loan or other means.

6.2. All interests in real and personal property, whether of a tangible or intangible nature, which the Corporation may acquire by grant, gift, loan, purchase, lease or other means.

6.3. All earnings, interest, dividends, accumulations, contract rights, claims and other proceeds arising from the above listed assets.

ARTICLE 7

7.0 *Directors.*

7.1 *General Powers.* The business and activities of the Corporation shall be managed by the Board of Directors.

7.2 *Duties and Powers.* The Board of Directors is hereby vested with all powers necessary to carry out the purposes of the Corporation and shall have control and management of the business and activities of the Corporation. The Directors shall in all cases act as a board. The Directors may adopt such rules and regulations for the conduct of their meetings and the management of the Corporation as they may deem proper, not inconsistent with the Shakopee Mdewakanton Sioux Community Business Corporation Ordinance and other tribal laws, or these Articles of Incorporation.

7.3 *Election, Number and Tenure.* Subject to the provisions of Section 7.5 of these Articles, which shall otherwise control, the Board of Directors established by the Articles of Incorporation shall consist of the three members of the Shakopee Mdewakanton Sioux Community Business Council, and no more than four (4) additional members, elected by a majority of the Board, for a maximum total of (7) seven. Notices of the election of any Director shall be sent by first class mail to the Members of the Corporation within 2 business days of the election.

7.31 The election of each additional member of the Board shall be subject to recall by a majority of all of the Members of the Corporation within 15 days of the election of the Director by the Board. Such recall election shall be noticed by the Chairman as provided in Section 7.12 of this Ordinance, if one-third of the Members of the Corporation submit a petition to the chairman demanding such recall election.

7.32 Each Director shall hold office until the expiration of the term to which he or she was elected and until the successor has been elected and qualified.

7.4 *Initial Directors.* The initial Board of Directors shall consist of the Business Council serving at the date of incorporation, Chairman Leonard Prescott; Vice-Chairperson Allene Ross, and Secretary-treasurer Melvin Campbell Sr. At least two additional initial members of the Board shall be elected from among the voting members of the Community by the unanimous vote of the three aforementioned Directors at the first meeting of the Board. If any of the initial Directors shall leave office during the initial five year term, the remaining members of the Board shall fill the vacancy.

7.41. *Community Members Must Comprise a Majority of the Board.* Notwithstanding any other provision of the Articles, all five original Directors, and thereafter, at least a majority of the members of the board, plus one, shall be voting members of the Community, but only one member of any one family shall be eligible to simultaneously serve on the Board. For

purposes of this Section 7.41, "family" shall mean: father, mother, brother, sister, sons, daughters, and grandparents.

7.5 *Term of Office.* The initial Board of Directors shall serve for a term of five years from the date of incorporation, Section 7.3 and 7.17 of this Ordinance notwithstanding. Thereafter, the three members of the Shakopee Mdewakanton Sioux Community Business Council, if not then Directors, shall succeed the three Directors initially appointed, pursuant to the first sentence of Section 7.4 and successors shall be elected to the Directors elected pursuant to the second sentence of Section 7.4. The terms of the Directors who hold office by virtue of their offices as members of the Shakopee Mdewakanton Sioux Community Business Council shall continue for so long as they shall remain members of the Business Council. Upon the resignation, death, removal, or replacement of a member of the Business Council, such persons term of office as a Director shall simultaneously expire, and his or her successor as such member shall automatically become a Director of the Corporation. Successors to the elected Directors shall serve for three year terms from the date of election.

Vacancies on the Board of Directors shall be filled in accordance with these Articles, as they may occur.

7.6. *Compensation.* By Resolution of the Board of Directors, Directors shall be paid their actual and reasonable expenses, if any, of attendance at each meeting of the Board of Directors, and such reasonable compensation as may be determined by the Board of Directors; provided that nothing herein contained shall be construed to preclude

any Director from serving the corporation in any other capacity and receiving appropriate compensation for that service.

7.7. *Action of the Board.* The vote of the Directors shall be the act of the Board, and each Director shall have one vote. The Board of Directors may take any required or permitted action without meeting, provided that the action is taken by at least a quorum and that consent to the action is evidenced in writing by at least a quorum of Directors including the Chairman, and the consent is included in the corporate minutes and records.

7.8. *Quorum.* A majority of Directors shall constitute a quorum for the transaction of business in any regular or special meeting. The quorum must either include the Chairman, or the action taken must occur with the written consent of the Chairman. The act of a majority of a quorum of Directors including the Chairman or on his written consent, shall be the act of the Board.

7.9. *Regular Meetings.* One regular meeting of the Board shall be held within thirty (30) days after the Board is duly elected. The Board may provide by resolution the time, place and manner for holding regular meetings thereafter.

7.10. *Special Meetings.* Special meetings of the Board may be called at the request of the Chairman of the Board of Directors, the President of the Corporation, or by any two Directors.

7.11. *Annual Meeting.* A regular annual meeting of the Board shall be held immediately following the annual meeting of the Corporation.

7.12. *Notice of Special Meetings.* The Board may provide by resolution for the giving of notice for

special meetings. Any Directors may waive this right to notice of any meeting. The nature of the business to be transacted, and the purpose of any regular or special meeting of the Board of Directors shall be specified in the notice, or waiver of notice, of such a meeting.

7.13. *Manner of Meeting.* The Board of Directors may conduct regular or special meetings through the use of any means of communication by which all directors may simultaneously hear each other.

7.14. *Appointments.* The Board of Directors shall appoint all corporate officers. Each officer shall hold office until his successor has been duly appointed and qualified, or until removed as hereinafter provided.

7.15. *Vacancies and Removals.* Any vacancy occurring among the Directors may be filled by vote of the remaining members of the Board. A Director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office. A Director may be removed for cause, by vote of a majority of all of the Members of the Corporation. Any removal action against the federally recognized Chairman of the Shakopee Mdewakanton Sioux Community, shall not be effective, unless and until such federal recognition as Chairman is withdrawn.

7.151. *Specific Notice of Removal Meeting Required.* A director may be removed by the Members, only at a meeting called for the purpose of removing the director and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.

7.152. *Removal by Judicial Action Started by Members.* The Shakopee Mdewakanton Sioux Community Court may remove a director from office in a proceeding commenced by the Corporation or at least 10% of Members if the Court finds that the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the Corporation.

7.153. *Removal by Judicial Action Started by Business Council.* A director may be removed for cause, as described in Section 7.152, in a proceeding in the Shakopee Mdewakanton Sioux Community Court commenced by the Shakopee Mdewakanton Sioux Community Business Council.

7.16. *Resignation.* Any Director may resign from office at any time, such resignation to be made in writing and to take effect immediately without acceptance.

7.17. *Veto Power.* Subject to the provisions of Section 7.5 of this Ordinance, which shall otherwise control, the federally recognized Chairman of the Shakopee Mdewakanton Sioux Community shall serve as Chairman of the Board of Directors. The Chairman shall have the power to veto any action of the Board of Directors, provided that any such veto may be overridden by the unanimous vote of the remaining members of the Board or by a two-thirds majority of all of the Members of the Corporation.

7.18. *Contracts.* The Board of Directors may authorize any officer or agent to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Corporation, and such authority may be general or confined to specific instances.

7.19. *Loans.* No loans greater than $10,000.00 (TEN THOUSAND DOLLARS) shall be contracted on behalf of the Corporation and evidence of indebtedness shall not be issued in the Corporation's name unless authorized by a resolution of the Board of Directors. Such authority may be general or confined to specific instances.

7.20. *Deposits.* All funds of the Corporation not otherwise employed shall be deposited from time to time to the credit of the Corporation in such banks, trust companies or other depositories as the Board of Directors may select.

ARTICLE 8

8.0. *Corporate Officers*

8.1. *Number.* At its initial meeting, the Board of Directors shall appoint a President, Vice-President, Secretary and Treasurer. Other officers and assistant officers and agents deemed necessary may be appointed by the Board of Directors. Individuals may hold multiple offices, but the offices of President and Vice-President may not be jointly held.

8.2. *Term of Officers.* At the annual Director's meeting following annual meeting of the members of the Corporation, the Directors shall choose the corporate officers as provided in these Articles. Each officer shall hold office until the successor is appointed and qualified, or until removed.

8.3. *Removal.* Any officer of the Corporation may be removed by a majority of the Board, with or without cause, when in the judgment of the Board it would be in the best interests of the

Corporation. Such removal shall be without prejudice to the contract rights, if any, of the person removed.

8.4. *Duties of Officers.* The duties and powers of the officers of the Corporation are those specified in these Articles and shall include any additional duties and powers as may be set by resolution of the Board of Directors.

8.41. *President.*

A. The President shall be the principal executive officer of the Corporation and shall supervise and control all of the business activities of the Corporation.

B. The President shall present an annual report of the condition of the business of the Corporation to the Board of Directors.

C. The President shall appoint, discharge and fix the compensation of all employees and agents of the Corporation other than the duly appointed officers by the Board of Directors, subject to the approval of the Board of Directors.

D. The President shall sign and execute all contracts in the name of the Corporation, all deeds, mortgages, notes, drafts, or other orders for the payment of money, or other instruments which the Board of Directors have authorized to be executed, except in cases where the signing and execution shall be expressly delegated by the Board of Directors to some other officer or agent of the Corporation, or shall be required by law to be otherwise signed or executed.

E. The President shall cause all books, reports, statements, and certificates to be properly kept and filed as required by law.

F. The President shall enforce these Articles and perform all duties incident to the office and which are required by law, and, generally, perform all duties as may be prescribed by the Board of Directors from time to time.

8.42. *Vice President.* In the absence of the President, the Vice President shall perform the duties of the President, and when so acting, shall have all the powers and be subject to all the responsibilities of the office of President. The Vice President shall also perform such other duties and have such other powers as from time to time may be assigned to him by the Board of Directors or President.

8.43. *Secretary.*

A. The Secretary shall be responsible for keeping the minutes of the meetings of the Board of Directors in an appropriate book set aside and used exclusively for such purpose.

B. The Secretary shall be responsible for giving notice of special meetings of the Board of Directors.

C. The Secretary shall be the custodian of the records and seal of the Corporation and shall affix the seal on Corporation papers when required.

D. The Secretary shall attend to all correspondence and present to the Board of Directors at its meetings all official communications received by the Secretary.

E. The Secretary shall in general perform all duties incident to the office of the Secretary and such other duties as from time to time may be

assigned by the President or by the Board of Directors.

8.44. *Treasurer*

A. The Treasurer shall have the care and custody of and be responsible for all funds and securities of the Corporation, and shall be responsible for the deposit of such funds and securities in the name of the Corporation in such banks, trust companies or other depositories as shall designated by the Board of Directors.

B. Subject to banking resolutions adopted by the Board of Directors, the treasurer shall, with the additional signature of either the President or Vice-President make, sign and endorse in the name of the Corporation all checks, drafts, notes, and other orders for the payment of money, and pay out and dispose of such under the direction of the President or the Board of Directors.

C. The Treasurer shall be responsible for keeping at the principal office of the Corporation accurate books of account of all its business and transactions and shall at all reasonable hours exhibit books and accounts to any director upon application at the office of the Corporation during business hours.

D. A report shall be rendered by the Treasurer of the condition of the finances of the Corporation at such times as shall be required by the Board.

E. The Treasurer shall perform all duties incident to the office of Treasurer of the Corporation.

F. If required by the Board of Directors, the Treasurer shall give such bond as the Board shall

determine appropriate for the faithful performance of the duties of Treasurer.

8.45. *Other Officers* Other officers shall perform such duties and have such powers as may be assigned to them by the Board of Directors. Assistant secretaries and assistant treasurers, in general, shall perform such duties as shall be assigned to them by the Secretary or the Treasurer, respectively, or by the President or the Board of Directors.

8.5. *Vacancies.* All vacancies in any office shall be filled promptly by the Board of Directors, either at regular meetings or at a meeting specially called for that purpose.

8.6. *Compensation of Officers.* The officers shall receive such salary or compensation as may be fixed by the Board of Directors. No officer shall be prevented from receiving compensation by reason of the fact that the officer is also a Director of the Corporation.

ARTICLE 9

9.0. *Distribution of Net Profit to Community Required.* Any Net Profits or Dividends of the Corporation shall be delivered to the Community for distribution as provided by the Shakopee Mdewakanton Sioux Community Business Proceeds Distribution Ordinance No. 12-29-88-002, in the same manner as has occurred when the gaming businesses of the Community were operated directly by the Community. If the Corporation fails to make timely delivery of such Net Profits or Dividends as a result of any action or inaction by the Board of Directors, or officers and

employees of the Corporation under their direction and control, and such failure is certified by the auditors for the Community or the Corporation, that certified failure shall be deemed to be sufficient cause for removal, pursuant to Article 7.15, 7.152 or 7.153, of the responsible Directors.

ARTICLE 10

10.0. *Amendment* These Articles of Incorporation may be unanimously altered, amended, repealed or new Articles may be unanimously adopted by the Board of Directors at a regular or special meeting of the Board, provided that any such amendments which are not unanimously approved by the Board of Directors shall be ratified and approved by a majority of all of the Members of the of the Corporation. Any amendments which are unanimously adopted by the Board, shall be subject to repeal, by action of a majority of all of the Members of the of the Corporation.

ARTICLE 11

11.0. *Bylaws.* This Corporation shall have no bylaws.

ARTICLE 12

12.0. *Dividends.* If the Corporation accumulates excess capital by sale of assets, or some other unusual event, the Board may, in its sole discretion, taking into account such reserves as the Board deems necessary, declare and deliver a dividend to the Community. Dividends may be declared in such amounts and at such times as the Board may determine, provided that all such

dividends shall be delivered to the Community for distribution as provided by Article 9.

ARTICLE 13

13.0. *Corporate Seal.* The seal of the Corporation shall be circular in form and bear the name of the Corporation and the year of its organization.

ARTICLE 14

14.0 *Indemnification.* The Corporation shall indemnify any Director or officer or former Director or officer of the Corporation, against expenses actually and reasonably incurred by him in connection with the defense of any action, suit or proceeding, civil or criminal, in which he is made a party by reason of being or having been such a director or officer, except in relation to matters as to which he shall be adjudged in such action, suit or proceeding to be liable for negligence, fraud or misconduct in the performance of duty to the Corporation.

ARTICLE 15

15.0 *Incorporators.* The incorporators of the Corporation are:

Leonard Prescott, Chairman, Shakopee Mdewakanton Sioux Community, 13733 Thunderbird Circle, Shakopee, Minnesota, 55379.

Allene Ross, Vice Chair, Shakopee Mdewakanton Sioux Community, 13570 McKenna Road, Shakopee, Minnesota 55379

Melvin Campbell, Sr., Secretary-Treasurer, 2950 W. Woodland Trail, Shakopee, Minnesota 55379.

ARTICLE 16

16.0 *Fiscal Year.* The Corporation shall have a fiscal year, which shall be determined by the Board of Directors during the first twelve months of operation of the Corporation. Such fiscal year shall end on the last day of any one calendar month, and shall begin the first day of the next succeeding calendar month.

/s/
Leonard Prescott
Chairman & Incorporator

/s/
Melvin Campbell, Sr.
Secretary-Treasurer
& Incorporator

/s/
Allene Ross
Vice Chairperson & Incorporator

COUNTY OF SCOTT)
)
ss)
)
STATE OF MINNESOTA)

The foregoing instrument was acknowledged before me this 18th day of March, 1991, by Leonard Prescott, Chairman of SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, a federally recognized Indian tribe, on behalf of the Community.

/s/
Diane L. Jensen
Notary Public

[seal]

COUNTY OF SCOTT)
)
ss)
)
STATE OF MINNESOTA)

The foregoing instrument was acknowledged before me this 18th day of March, 1991, by Allene K. Ross, Vice-Chairperson of the SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, a federally recognized Indian tribe, on behalf of the Community.

/s/
Diane L. Jensen [seal]
Notary Public

COUNTY OF SCOTT)
)
ss)
)
STATE OF MINNESOTA)

The foregoing instrument was acknowledged before me this 18th day of March, 1991, by Melvin Campbell, Sr. Secretary-treasurer of the SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, a federally recognized Indian tribe, on behalf of the Community.

/s/
Diane L. Jensen [seal]
Notary Public

Filed: 3/19/91

Date /s/
Kay Tupper-Bunker
Clerk of Court
Shakopee Mdewakanton Sioux Community

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY
Corporation Ordinance
As Enacted 2-27-91-004

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SECTION 1

1.0. *Title.* This Ordinance shall be known as the Shakopee Mdewakanton Sioux Community Business Corporation Ordinance.

SECTION 2

2.0. *Definitions.* As used in this Ordinance:

2.01 "Articles of incorporation" means the original or restated articles of incorporation or articles of consolidation and all amendments thereto.

2.02 "Authorized shares" means the shares of all classes which the corporation is authorized to issue.

2.03 "Clerk of Court" means the Clerk of Court for the Shakopee Mdewakanton Sioux Community.

2.04 "Corporation" means a corporation subject to the provisions of this Ordinance.

2.05 "Community" means the Shakopee Mdewakanton Sioux Community.

2.06 "General Council" means the General Council of the Shakopee Mdewakanton Sioux Community as defined pursuant to the Constitution and Bylaws of the Community.

2.07 "Net Assets" means the amount by which the total assets of a corporation exceed the total debts of the corporation.

2.08 "Member" and "Member of the Corporation" shall mean a voting member of the Shakopee Mdewakanton Sioux Community, holding a voting interest in a corporation wholly owned by the Community.

2.09 "Shares" means the units into which the ownership interests in a corporation are divided.

2.10 "Shareholder" means one who is a holder of a record of shares in a corporation.

SECTION 3

3.0. *Purposes.* Corporations may be organized under this Ordinance for any lawful purpose or purposes. Unless otherwise provided in its Articles, a corporation has general business purposes.

SECTION 4

4.0. *General Powers.* Subject to any limitations provided in any other laws of the community, or in a Corporation's articles, each corporation shall have power:

4.01. To have perpetual succession by its corporate name unless a limited period of duration is stated in its articles of incorporation.

4.02. Subject to the provisions of Section 4.12 in the case of corporations wholly owned by the Community, To sue and be sued, complain and defend, in its corporate name, except that the extent of the corporation's liability shall be limited to the assets of the corporation and shall be subject to the limitations contained in Section 11 of this Ordinance.

4.03. To have a corporate seal which may be altered at pleasure, and to use the same by causing it, or a facsimile thereof, to be impressed or affixed or in any other manner reproduced. A corporation is not obligated to adopt a corporate seal. The use or nonuse of a corporate seal shall not

affect the validity, recordability, or enforceability of a document or act. If a corporation has a corporate seal, the use of the seal by the corporation on a document is not necessary.

4.04. To purchase, take, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

4.05 To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.

4.06. To lend money and use its credit to assist its employees.

4.07. To purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof.

4.08. To make contracts and guarantees and incur liabilities, borrow money at such rates of interests as the corporation may determine, issue its notes, bonds, and other obligations by mortgage or pledge

of all or any of its property, franchises and income.

4.09. To lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.

4.010. To conduct its business, carry on its operations and have offices and exercise the powers granted by this Ordinance, within or without the Community reservation boundaries.

4.011. To elect or appoint officers and agents of the corporation, and define their duties and fix their compensation.

4.012 to make and alter by-laws, not inconsistent with its articles of incorporation or with the laws of the Shakopee Mdewakanton Sioux Community, for the administration and regulation of the affairs of the corporation.

4.013. To make donations for the public welfare or for charitable, scientific or educational purposes.

4.014. To transact any lawful business which the board of directors shall find will be in aid of governmental policy.

4.015. To pay pensions and establish pension plans, pension trusts, profit sharing plans, stock bonus plans, stock option plans and other incentive plans for any or all of its directors, officers and employees.

4.016. To be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust or other enterprise.

4.017 To establish committees of the board of directors, elect or appoint persons to the committees, and define their duties and fix their compensation.

4.018. To have and exercise all powers necessary or convenient to effect its purposes.

4.1. *Special Powers of Corporations Wholly Owned by the Community.* The special powers described in this Section 4.1 shall only be available to a Corporation wholly owned by the Community.

4.11. A Corporation wholly owned by the Community may assume any or all of the Community's rights, privileges and immunities (including, without limitation, sovereign immunity) concerning federal, state, or local taxes or regulations, and jurisdiction to the same extent that the Community would have such rights, privileges and immunities if it engaged in the activities undertaken by the Corporation. Absent consent, a Corporation wholly owned by the Community shall not be subject to taxation by the Community, except to the extent that such taxation is necessary and reasonably appropriate to compensate the Community for services provided to the corporation by the Community.

4.12. A corporation wholly owned by the Community, shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Community, and other courts of competent jurisdiction, provided, however, that any recovery against such corporation shall be limited to the assets of the corporation, and that to be effective,

such corporation, only upon action of the Board of Directors, must explicitly consent to be sued in a contract or other commercial document which specifies the terms and conditions of such consent.

4.2 Any corporation which holds an interest in trust land may not encumber that interest, without the prior written approval by the Community and the Area Director, Minneapolis Area Office Bureau of Indian Affairs.

SECTION 5

5.0. *Corporate Name.* The corporate name:

5.1. Shall contain the word "corporation", "company", "incorporated" or "limited", or shall contain an abbreviation of one of such words.

5.2. Shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its articles of incorporation.

5.3. Shall not be the same as, or deceptively similar to, the name of any corporation existing under the laws of the Shakopee Mdewakanton Sioux Community, or the State of Minnesota, or a name the exclusive right to which is, at the time, reserved in the manner provided in this Ordinance, or the name of a corporation which has in effect a registration of its corporate name as provided in this Ordinance, or the laws of the State of Minnesota.

SECTION 6

6.0. *Registered Agent.* Each corporation organized pursuant to this Ordinance shall have and continuously maintain on the Shakopee Mdewakanton Sioux Community Reservation a mailing address for a registered agent which address may be, but need not be, the same as its place of business.

SECTION 7

7.0. *Service of Process on Corporation.* Any officer of a corporation or the registered agent so appointed by a corporation shall be an agent of such corporation upon whom any process notice or demand required or permitted by law to be served upon the corporation may be served.

SECTION 8

8.0. *Authorized Shares.* Each corporation shall have power to create and issue the number of shares stated in its articles of incorporation. Such shares may be divided into one or more classes, any or all of which classes may consist of shares with par value or shares without par value, with such designation, preferences, limitations, and relative rights as shall be stated in the articles of incorporation. The articles of incorporation may limit or deny the voting rights of or provide special voting rights for the shares of any class to the extent not inconsistent with the provisions of this Ordinance.

8.1. *Preferred or Special Shares.* Without limiting the authority herein contained, a corporation, when so provided in its articles of incorporation, may

provide or authorize the board of directors to issue shares of preferred or special classes:

8.11. Subject to the right of the corporation to redeem any of such shares at the price fixed by the articles of incorporation, or by the board of directors for the redemption thereof.

8.12. Entitling the holders thereof to cumulative, noncumulative or partially cumulative dividends.

8.13. Having preference over any other class or classes of shares as to the payment of dividends.

8.14. Having preference in the assets of the corporation over any other class or classes of shares upon the voluntary or involuntary liquidation of the corporation.

8.15. Convertible into shares of any other class or into shares of any series of the same or any other class.

8.2. *Shares in Community Owned Corporations.* Corporations wholly owned and operated by the Shakopee Mdewakanton Sioux Community shall issue a stock certificate to the Community; and all shares evidenced by such certificate shall be held by and for the Community. The members of the General council shall enjoy such voting rights in the corporation as are provided by the Constitution and bylaws of the Community to members of the General Council, with additional procedural voting rights in the Corporation as provided in Section 40.0 of this Ordinance. The voting rights of the members of the General Council in a Corporation wholly owned by the

Community shall not be diminished or enhanced by the issuance of shares. Notwithstanding Section 8.1, corporations wholly owned by the Community may not issue preferred or special shares.

SECTION 9

9.0. *Payment For Shares.* The consideration, if any, for the issuance of shares may be paid, in whole or in part, in cash, in other property, tangible or intangible, received or to be received by the corporation, or in labor or services actually performed, or to be performed for the corporation.

9.1. *Future Consideration for Shares.* Promissory notes, future services, or other consideration which has only an intangible future value may be accepted as payment or part payment for the issuance of shares of a corporation.

9.2 Notwithstanding the provisions of this Section 9, a member of the Community may not sell, transfer, assign, devise or bequeath, voting rights in a corporation wholly or partially owned by the Community. This Section shall not limit a members right to issue a proxy as provided in Section 40.0.

SECTION 10

10.1. *Certificates Representing Shares.* The shares of a corporation shall be represented by certificates signed by an agent or officer authorized in the articles or bylaws to sign share certificates, or in the absence of such authorization, by an officer of the corporation.

10.2 *Certificates Representing Voting Rights in Corporations Wholly Owned by the Community.* The voting

rights in a corporation wholly owned by the Community shall be represented by certificates signed by the Clerk of Court, and shall evidence those rights as provided in this Ordinance.

SECTION 11

11.0. *Limited Liability of Shareholders.* A holder of shares of a corporation, and, with respect to Corporations wholly owned by the Community, the holder of any voting rights, shall be under no obligation to the corporation or its creditors with respect to such shares, or voting rights, other than the obligation to pay to the corporation the full consideration for which such shares were issued or to be issued.

11.1. *Limited Liability of Shakopee Mdewakanton Sioux Community.* The Shakopee Mdewakanton Sioux Community shall be under no obligation to a corporation or the creditors of any corporation which the Community incorporates, owns or operates, in whole or in part, and the Community shall not be deemed to have waived any of the Community's privileges or immunities if the Community incorporates, owns or operates a corporation, in whole or in part.

SECTION 12

12.0. *By-laws.* A corporation may, but need not, have by-laws. The initial by-laws of a corporation may be adopted by its board of directors. Unless reserved to the shareholders by the articles, the power to alter, amend, or repeal the by-laws or adopt new by-laws, subject to repeal or change by action of the shareholders, shall be vested in the Board of Directors.

SECTION 13

13.0. *Articles of Incorporation.* The articles of incorporation shall set forth:

(a) The name of the corporation; and

(b) The mailing address of the corporation office and the name of its registered agent at that address; and

(c) The aggregate number of shares that the corporation has authority to issue; and

(d) The name and address of each incorporator.

13.1 *Provisions Subject to Modification in Articles.* The following provisions govern a corporation unless modified in the articles:

(a) A corporation has general business purposes;

(b) A corporation has perpetual existence and certain powers as provided in this ordinance;

(c) The power to adopt, amend or repeal the bylaws is vested in the board;

(d) The corporation does not permit cumulative voting for directors;

(e) The affirmative vote of a majority of directors present is required for an action of the board;

(f) A written action by the board taken without a meeting must be signed by a majority of the directors;

(g) The board may authorize the issuance of securities and rights to purchase securities;

(h) All shares are common shares entitled to vote and are of one class and one series;

(i) All shares have equal rights and preferences in all matters not otherwise provided for by the board;

(j) The par value of shares is fixed at one cent per share for certain purposes and may be fixed by the board for certain other purposes;

(k) The board or the shareholders may issue shares for any consideration or for no consideration to effectuate share dividends or splits, and determine the value of nonmonetary consideration.

(l) Shares of a class or series must not be issued to holders of shares of another class or series to effectuate share dividends or splits, unless authorized by a majority of the voting power of the shares of the same class or series as the shares to be issued.

(m) A corporation may issue rights to purchase securities whose terms, provisions, and conditions are fixed by the board;

(n) A shareholder has no preemptive rights, unless otherwise provided by the board;

(o) The affirmative vote of the holders of a majority of the voting power of the shares present and entitled to vote at a duly held meeting is required for an action of the

shareholders, except where this ordinance requires the affirmative vote of a majority of the voting power of all shares entitled to vote;

(p) Shares of a corporation acquired by the corporation may be reissued.

(q) Each share has one vote unless otherwise provided in the terms of the share;

(r) A corporation may issue shares for a consideration less than the par value, if any, of the shares;

(s) Except as limited by Sections 4.12, A corporation shall have the power to sue and be sued in the Judicial Court of the Community, and in other courts of competent jurisdiction; provided, however, that any recovery against a corporation shall be limited to the assets of the corporation.

13.2 *Provisions Subject to Modification in Articles or bylaws.* The following provisions govern a corporation unless modified either in the articles or in the bylaws:

(a) Directors serve for an indefinite term that expires at the next regular meeting of the shareholders;

(b) The compensation of the board is fixed by the board.

(c) If the board fails to select a place for a board meeting, it must be held at the principal executive office;

(d) A director may call a board meeting, and the notice of the meeting need not state the purpose of the meeting;

(e) a majority of the board is a quorum for a meeting;

(f) a committee shall consist of one or more persons, who need not be directors, appointed by a majority vote of the directors present;

(g) The board may establish a special litigation committee;

(h) Officers may delegate some or all of their duties and powers, if not prohibited from so doing;

(i) Regular meetings of shareholders need not be held, unless demanded by at least 10% of the shareholders;

(j) In all instances where a specific minimum notice period has not otherwise been fixed by law, not less than five days notice is required for a meeting of shareholders;

(k) the number of shares required for a quorum at a shareholder's meeting is a majority of the voting power of the shares entitled to vote at the meeting;

(l) The board may fix a date up to sixty days before the date of a shareholders' meeting as the date for the determination of the holders of shares entitled to notice of and entitled to notice of the meeting;

(m) Indemnification of directors is required;

(n) The board may authorize, and the corporation may make, distributions not prohibited, limited, or restricted by an agreement.

13.3 *Permitted Provisions if Included in Articles.* The following provisions relating to the management of the business or the regulation of the affairs of a corporation may be included in the articles;

(a) The members of the first board may be names;

(b) A larger than majority vote may be required for board action;

(c) A director's personal liability to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director may be limited to negligence, fraud or misconduct;

(d) The manner of giving or prescribing the manner of giving voting rights to persons other than shareholders.

13.4 *Permitted Provisions if Included in bylaws.* The following provisions relating to the management of the business or the regulation of the affairs of a corporation may be included in the bylaws:

(a) A manner for increasing or decreasing the number of directors;

(b) Additional qualifications for directors;

(c) Directors may be classified;

(d) Absent directors may be permitted to give written consent or opposition to a proposal;

(e) Authority to sign and deliver certain documents may be delegated to an officer or agent of the corporation, other than the chief executive officer;

(f) Additional officers may be designated;

(g) Additional powers, rights duties, and responsibilities may be given to officers;

(h) a method for filling vacant offices may be specified;

(i) A certain officer or agent may be authorized to sign share certificates;

(j) The transfer or registration of transfer of securities may be restricted.

13.5 Consent to suit by a corporation shall in no way extend to the community, nor shall a consent to suit by a corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the community.

13.6 The articles may contain other provisions not inconsistent with law relating to the management of the business or the regulation of the affairs of the corporation

13.7 It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this ordinance.

SECTION 14

14.0 *Incorporators.* Any member of the Shakopee Mdewakanton Sioux Community over the age of eighteen may act as the incorporator of a corporation by delivering articles of incorporation to the Clerk of Court for filing.

SECTION 15

15.0 *Filing of Incorporation.* Duplicate originals of the articles of incorporation shall be delivered to the Clerk of Court for the Shakopee Mdewakanton

Sioux Community. If the clerk finds that the articles of incorporation conform to tribal law, the clerk shall:

15.1 Endorse on each such duplicate originals the word "filed" and the month, day, and year of the filing thereof.

15.2 Maintain one such duplicate original in the office of the Clerk of Court.

15.3 Issue a certificate of incorporation to which the Clerk of Court shall affix the duplicate original and return to the incorporators.

SECTION 16

16.0. *Effect of Issuance of Certificate of Incorporation.* Upon the issuance of the certificate of incorporation, the corporate existence shall begin.

SECTION 17

17.0 *Right to Amend or Restate Articles of Incorporation.* A corporation may amend or restate its articles of incorporation.

SECTION 18

18.0 *Articles of Amendment or Restatement.* The articles of amendment or restatement shall be executed by: (a) its president or a vice president and (b) its secretary.

SECTION 19

19.0 *Filing of Articles of Amendment or Restatement.* Duplicate originals of the articles of amendment or restatement shall be delivered to the Clerk of

Court of the Shakopee Mdewakanton Sioux Community. If the Clerk determines that the articles of amendment or restatement conform to tribal law, the Clerk shall:

19.1 Endorse on each duplicate original the word "filed" and the month, day, and year of such filing thereof.

19.2 Maintain one such duplicate original in the Clerk's office.

19.3 Issue a certificate of amendment to which the Secretary shall affix the other duplicate original and return to the corporation.

SECTION 20

20.0 *Effect of Certificate of Amendment.* Upon the issuance of the certificate of amendment by the Clerk, the amendment shall become effective and the articles of incorporation shall be deemed to be amended accordingly.

SECTION 21

21.0 *Board of Directors.* The business and affairs of the corporation shall be managed by a board of directors, subject to any limitations set forth in the articles of incorporation. The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a member of the Shakopee Mdewakanton Sioux Community unless the articles of incorporation or bylaws so prescribe.

21.1 *Special Committees.* An affirmative vote of a majority of the board may establish committees

having the authority of the board in the management of the business of the corporation only to the extent provided in the resolution. Committees may include a special litigation committee consisting of one or more independent directors or other independent persons to consider legal rights or remedies of the corporation and whether those rights or remedies should be pursued. Committees other than special litigation committees are subject at all times to the direction and control of the board. The committees shall consist of one or more persons, who need not be directors.

SECTION 22

22.0 *Number and Election of Directors.* A board of directors must consist of one or more individuals, with the number established in the articles of incorporation or bylaws. Initial directors may be named in the articles of incorporation or elected as provided in the articles, subject to Section 23. If a corporation is to be wholly or partially owned by the Shakopee Mdewakanton Sioux Community, the Articles of Incorporation or bylaws may provide that the Shakopee Mdewakanton Sioux Business Council may vote the Community's shares.

If the articles of incorporation authorize dividing the shares into classes, the articles may also authorize the election of all or a number of directors by the holders of one or more authorized classes of shares.

SECTION 23

23.0 *Terms of Directors.* The terms of the initial directors expire at the first shareholders' meeting at which directors are elected, unless the articles provide otherwise, but in no case shall any one term of any director exceed five years. The terms of all subsequent directors expire at the next annual meeting following their election unless the articles of incorporation or bylaws provide otherwise or for staggered terms. Directors appointed to fill a vacancy shall serve until the next shareholders' meeting at which directors are elected. Despite expiration of a director's term, a director continues to serve until the successor is elected and qualifies or until the board size is decreased. The articles of incorporation or bylaws may provide for staggered terms.

SECTION 24

24.0 *Resignation of Directors.* A director may resign at any time by delivering written notice to the board of directors or its Chairman.

SECTION 25

25.0 *Removal of Directors.* The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only with cause. If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove the director.

25.1 A director may be removed by the shareholders only at a meeting called for the purpose of removing the director and the meeting notice

must state that the purpose, or one of the purposes, of the meeting is removal of the director.

25.2 The Shakopee Mdewakanton Sioux Community Court may remove a director from office in a proceeding commenced by the corporation or its shareholders holding at least 10% of the outstanding shares of any class if the Court finds that the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation and further finds that removal is in the best interest of the corporation.

25.3 If a corporation is wholly owned and operated by the Shakopee Mdewakanton Sioux Community, a director may be removed for cause in a proceeding in the Shakopee Mdewakanton Sioux Community Court commenced by the Shakopee Mdewakanton Sioux Business Council.

SECTION 26

26.0 *Vacancies on the Board.* Unless the articles of incorporation provide otherwise, a vacancy on the board may be filled by the board of directors.

SECTION 27

27.0 *Compensation of Directors.* Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

SECTION 28

28.0 *Meetings of the Board.* The board of directors may hold regular or special meetings, and need not

meet within the borders of the Shakopee Mdewakanton Sioux Community Reservation.

28.1 *Telecommunications Meetings Permitted.* Unless the articles of incorporation or bylaws provide otherwise, the board may permit any or all directors to conduct or participate in a meeting through the use of any means of communication by which all directors may simultaneously hear each other during the meeting. A director so participating is deemed present.

28.2 *Consent to Action Without Meeting Permitted.* Unless the articles of incorporation or bylaws provide otherwise, action by the board of directors may be taken without a meeting if a majority of the members take the action. Such action must be evidenced in writing, signed by the requisite number of directors and included in the minutes or filed with the corporate records.

SECTION 29

29.0 *Notice of Meeting.* Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board may be held without notice of the date, time, place or purpose of the meeting. Unless the articles of incorporation or bylaws provide for a different period, special meetings of the board must be preceded by at least forty eight hours notice of the date, time and place of the meeting. Either before or after a meeting, a director may waive, orally or in writing, any required notice, and a director's attendance at or participation in a meeting waives any required notice unless the director objects at the meeting's beginning and does not vote thereafter on actions at the meeting.

SECTION 30

30.0 *Quorum and Voting.* Unless the articles of incorporation or bylaws provide otherwise, a quorum consists of a majority of the number of directors, provided that in no event shall a quorum consist of fewer than one-third the number of directors. If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number. Robert's Rules of Order shall govern at such meetings, unless the articles or bylaws provide for another body of procedures for meetings.

SECTION 31

31.0 *Director Conflict of Interest.* A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has an interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction by a majority of the board or committee; but the interested director or directors shall not be counted in determining the presence of, or required number to constitute, a quorum and shall not vote.

(2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction by a majority of the shares entitled to vote that are owned by persons other than the interested director or directors; or

(3) the transaction was fair to the corporation at the time it was approved.

SECTION 32

32.0 *Loans to Directors.* A corporation may not lend money to or guarantee the obligation of a director of the corporation unless the shareholders approve the loan or guarantee or the board of directors determines the loan or guarantee benefits the corporation and approves the loan or guarantee. A corporation wholly owned by the Community may not lend money to or guarantee the personal obligation of a director, officer or employee of the corporation, under any circumstances.

SECTION 33

33.0 *Required Officers.* A corporation has the officers described in its articles or bylaws or appointed by the board of directors in accordance with the articles or bylaws. The articles or bylaws or the board of directors shall delegate to one of the officers responsibility for preparing minutes of the directors' and shareholders' meetings and for authenticating records of the corporation. The same individual may simultaneously hold more than one office in a corporation. Each officer has

the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors.

SECTION 34

34.0 *Resignation and Removal of Officers.* An officer may resign at any time by delivering notice to the corporation. A board of directors may remove any officer at any time with or without cause.

SECTION 35

35.0 *Contract Rights of Officers.* The appointment of an officer does not itself create contract rights, nor does the resignation or removal of an officer affect the contract rights, if any, of the officer or corporation. The removal is without prejudice to the contract rights of the officer.

SECTION 36

36.0 *General Standards for Directors and Officers.* Directors and officers shall discharge their duties:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner they reasonably believe to be in the best interests of the corporation.

SECTION 37

37.0 *Reliance.* In discharging their individual duties, a director or officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation whom the officer or director reasonably believe to be reliable and competent in the matters presented;

(2) legal counsel, public accountants, or other persons as to matters the officer or director reasonably believes are within the person's professional or expert competence; or

(3) a committee of the board of directors upon which the officer or director does not serve, if such officer or director reasonably believe the committee merits confidence.

Directors and officers are not liable for any action taken in their corporate capacity, or any failure to take any action, it they performed the duties of office in compliance with this section.

SECTION 38

38.0 *Meetings of Shareholders and Members.* A corporation may hold a meeting of shareholders, or in the case of Corporations wholly owned by the Community, of Members, on an annual or other less frequent periodic basis, but need not be held unless required by the articles or bylaws or by Section 38.2. Annual meetings need not be held within the Reservation, but annual meetings of

corporations wholly owned by the Community shall be held within 40 miles of the Reservation.

38.1 The failure to hold an annual meeting does not affect the validity of any corporate action.

38.2 If a regular meeting of shareholders, or in the case of Corporations wholly owned by the Community, of Members has not been held during the immediately preceding 400 days, a shareholder, shareholders, or Members holding 3% or more of the voting power of all shares entitled to vote may demand a regular meeting by written notice of demand given to an officer of the corporation. Within 30 days after receipt of the demand by an officer, the board shall cause a regular meeting to be called and held on notice no later than 90 days after receipt of the demand, all at the expense of the corporation. If the board fails to cause a regular meeting to be called and held as required by this Section 38.2, the shareholder, shareholders or Members making the demand may call the regular meeting by giving notice as required by section 39, all at the expense of the corporation.

38.3 In the case of corporations wholly owned by the Shakopee Mdewakanton Sioux Community, a special meeting may be called, and meetings may be called and held in the same manner as applicable law provides for meetings of the General Council.

38.4 Unless the articles of incorporation or bylaws provide otherwise, action

required to be taken at a shareholder's or in the case of Corporations wholly owned by the Community, Members, meeting may be taken without a meeting if the action is taken by a majority of shareholders or Members or a majority of each class of shareholders entitled to vote. Such action must be evidenced in writing, signed by the requisite number of shareholders and delivered to the corporation for inclusion in the minutes and records.

SECTION 39

39.0 *Notice of Shareholder Meetings.* A corporation shall notify shareholders of the date, time and place of each annual or special shareholders' meeting at least 10 days before the meeting. A shareholder may waive notice and a shareholder may be deemed to have waived notice if the shareholder attends the meeting unless the shareholder objects at the beginning of the meeting.

SECTION 40

40.0 *Voting Entitlement of Shares.* Unless the articles of incorporation provide otherwise, and subject to the provisions of Sections 8.2 and 9.2 of this Ordinance, each outstanding share is entitled to one vote on each matter voted on at a shareholder's meeting. A shareholder may vote a share, or in the case of a corporation wholly owned by the Community, a voting member of the Community may cast a ballot, in person or by proxy provided that the shareholder, or voter, has appointed a proxy by signing a notarized,

revocable, appointment and filed the appointment with the Clerk of Court. No irrevocable proxies shall be valid.

SECTION 41

41.0 *Voting Trusts and Agreements.* One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the trust's provisions and transferring the shares to the trustee. When a voting trust agreement is signed, the trustee shall deliver to the corporation the names and address of all owners of beneficial interests in the trust, together with the number and class of shares transferred to the trust. Two or more shareholders may also provide for the manner in which they will vote their shares by singing an agreement for that purpose. This Section, 41.0 shall not apply to interests in corporations wholly owned by the Community.

41.1 Any voting trust agreement for any interest held in a corporation wholly owned by the Community shall be void and unenforceable.

SECTION 42

42.0 *Quorum.* The holders of the majority of the voting power of the shares entitled to vote at a meeting are a quorum for the transaction of business, unless a larger or smaller proportion or number is provided in the articles or bylaws. The shareholders shall take action by the affirmative vote of the holders of a majority of the voting power of the shares present and entitled to vote, except where this Ordinance or the articles require a larger proportion or number. If the

articles require a larger proportion or number than is required by this ordinance for a particular action, the articles control.

SECTION 43

43.0. *Voluntary Dissolution by Incorporators.* A corporation which has not commenced business and which has not issued any shares, may be voluntarily dissolved by its incorporators at any time in the following manner:

43.1. Articles of dissolution shall be executed in duplicate by a majority of the incorporators, and verified by them, and shall set forth:

(1) The name of the corporation.

(2) The date of issuance of its certificate of incorporation.

(3) That none of its shares has been issued.

(4) That the corporation has not commenced business.

(5) That the amount, if any, actually paid in on subscriptions for its shares, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto.

(6) That no debts of the corporation remain unpaid.

(7) That a majority of the incorporators elect that the corporation be dissolved.

43.2. Duplicate originals of the articles of dissolution shall be delivered to the Clerk of Court. If the Clerk finds that the articles of dissolution conform to law, the Clerk shall:

(1) Endorse on each of such duplicate originals the word "filed", and the month, day and year of the filing thereof.

(2) File one of such duplicate originals in the Clerk of Court's Office.

(3) Issue a certificate of dissolution to which the Clerk shall affix the other duplicate original.

43.3. The certificate of dissolution, together with the duplicate original of the articles of dissolution affixed thereto by the Secretary, shall be returned to the incorporators or their representative. Upon the issuance of such certificate of dissolution by the Secretary, the existence of the corporation shall cease.

SECTION 44

44.0. *Voluntary Dissolution by Consent of Shareholders.* A corporation may be voluntarily dissolved by the written consent of a majority of each class of its shareholders. Subject to Section 64, a corporation wholly owned and operated by the Shakopee Mdewakanton Sioux Community shall only be dissolved voluntarily by a resolution adopted by a two-thirds majority of the then voting members of the Shakopee Mdewakanton Sioux Community General Council, upon recommendation and

approval of such resolution by the Board of Directors.

44.1 Upon the execution of such written consent, a statement of intent to dissolve shall be executed in duplicate by the corporation by its president or a vice president, or in the case of corporations wholly owned by the Community, by the Chairman and Vice-Chairman of the Community, and in all cases by the corporation's Secretary or an assistant secretary, and verified by one of the officers signing such statement, which statement shall set forth:

(a) The name of the corporation.

(b) A statement that written consent has been signed by the requisite number of shareholders of the corporation or signed in their names by their attorneys thereunto duly authorized.

SECTION 45

45.0. *Voluntary Dissolution by Act of Corporation.* A corporation may be dissolved by the act of the corporation, when authorized in the following manner:

45.1. The board of directors shall adopt a resolution recommending that the corporation be dissolved, and directing that the question of such dissolution be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

45.2. A corporation wholly owned and operated by the Shakopee Mdewakanton Sioux Community with no shares having been issued shall be dissolved by a resolution adopted by the Board of Directors and separately concurred in by a majority of the then voting members of the Shakopee Mdewakanton Sioux Community Business Council.

45.3 Written notice shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Ordinance for the giving of notice of meetings of shareholders, and, whether the meeting be an annual or special meeting, shall state that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the corporation.

45.4. At such meeting a vote of shareholders entitled to vote thereat shall be taken on a resolution to dissolve the corporation. Such resolution shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of the corporation entitled to vote thereon, unless any class of shares is entitled to vote thereon as a class, in which event the resolution shall be adopted upon receiving the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon as a class and of the total shares entitled to vote thereon.

45.5. Upon the adoption of such resolution, a statement of intent to dissolve shall be

executed in duplicate by the corporation by: (a) its president or a vice president and (b) by its secretary or an assistant secretary, and verified by one of the officers signing such statement, which statement shall set forth:

(1) The name of the corporation.

(2) A copy of the resolution adopted by the shareholders or the Community authorizing the dissolution of the corporation.

(3) The number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class.

(4) The number of shares voted for and against the resolution, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against the resolution, respectively.

SECTION 46

46.0. *Filing of Statement of Intent to Dissolve.* Duplicate originals of the statement of intent to dissolve, whether by consent of shareholders or by act of the corporation, shall be delivered to the Clerk of Court. If the Clerk of Court finds that such statement conforms to law, the Clerk shall:

46.1. Endorse on each of such duplicate originals the word "filed", and the month, day and year of the filing thereof.

46.2. File one of such duplicate originals in the Clerk of Court's Office.

46.3. Return the other duplicate original to the corporation or its representative.

SECTION 47

47.0. *Effect of Statement of Intent to Dissolve.* Upon the filing with the Clerk of Court of a statement of intent to dissolve, whether by consent of shareholders or by act of the corporation, the corporation shall cease to carry on its business, except insofar as may be necessary for the winding up thereof, but its corporate existence shall continue until a certificate of dissolution has been issued by the Clerk of Court or until a decree dissolving the corporation has been entered by the Shakopee Mdewakanton Sioux Community Court.

SECTION 48

48.0. *Procedure After Filing of Statement of Intent to Dissolve.* After filing with the Clerk of Court the statement of intent to dissolve:

48.1. The corporation shall immediately cause notice thereof to be mailed to each known creditor of the corporation.

48.2. The corporation shall proceed to collect its assets, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business and affairs, and, after paying or adequately providing for the payment of all its obligations, distribute the remainder of its assets, either in cash or in kind,

among its shareholders according to their respective rights and interests.

SECTION 49

49.0. *Articles of Dissolution.* When all debts, liabilities and obligations of the corporation have been paid and discharged, or adequate provision has been made therefor, and all of the remaining property and assets of the corporation have been distributed to its shareholders, articles of dissolution shall be executed in duplicate by the corporation by its president or a vice president and by its secretary, which statement shall set forth:

49.1. The name of the corporation.

49.2. That all debts, obligation and liabilities of the corporation have been paid and discharged or that adequate provision has been made therefore.

49.3. That all the remaining property and assets of the corporation have been distributed among its shareholders in accordance with their respective rights and interests.

49.4. That there are no suits pending against the corporation in any court, or that adequate provision has been made for the satisfaction or any judgment, order or decree which may be entered against it in any pending suit.

SECTION 50

50.0. *Filing Articles of Dissolution.* Duplicate originals of such articles of dissolution shall be delivered to the Clerk of Court. If the Clerk finds that such articles of dissolution conform to tribal law, the Clerk shall:

50.11. Endorse on each of such duplicate originals the word "filed", and the month, day and year of the filing thereof.

50.12. Maintain one of such duplicate originals in the Clerk of Court's Office.

50.13. Issue a certificate of dissolution to which the Clerk shall affix the other duplicate original.

50.20. The certificate of dissolution, together with the duplicate original of the articles of dissolution affixed thereto by the Clerk, shall be returned to the representative of the dissolved corporation. Upon the issuance of such certificate of dissolution the existence of the corporation shall cease, except for the purpose of suits, other proceedings and appropriate corporate action by shareholders, directors and officers.

SECTION 51

51.0. *Involuntary Dissolution.* A corporation may be dissolved involuntarily by a decree of the Shakopee Mdewakanton Sioux Community Court in an action filed in the name of the Community by the Business Council for the Shakopee Mdewakanton Sioux Community when it is established that:

51.1. The corporation procured its articles of incorporation through fraud; or

51.2. The corporation has continued to exceed or abuse the authority conferred upon it by law; or

51.3. The corporation has failed for ninety days to appoint and maintain a registered agent on the Shakopee Mdewakanton Sioux Community Reservation; or

51.4. The corporation has failed for ninety days after change of its registered officer or registered agent to file in the Clerk of Court's office a statement of such change.

SECTION 52

52.0. *Venue and Process.* Every action for the involuntary dissolution of a corporation shall be commenced by the General Counsel for the Community in the name of the Shakopee Mdewakanton Sioux Community in the Shakopee Mdewakanton Sioux Community Court. Summons shall issue and be served as in other civil actions.

SECTION 53

53 0. *Jurisdiction of Shakopee Mdewakanton Sioux community Court to Liquidate Assets and Business of Corporation.* The Shakopee Mdewakanton Sioux Community Court shall have full power to liquidate the assets and business of a corporation:

53.1. *Shareholder Actions.* In an action by a shareholder when it is established:

(1) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or

(2) That the acts of the directors or those in control of the corporation are illegal or fraudulent; or

(3) That the corporate assets are being misapplied or wasted.

53.2. *Actions by Creditors.* In an action by a creditor:

(1) When the claim of the creditor has been reduced to judgment and an execution thereon returned unsatisfied and it is established that the corporation is insolvent; or

(2) When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent.

53.3. *Action by the Corporation.* Upon application by a corporation which has filed a statement of intent to dissolve, as provided in this Ordinance, to have its liquidation continued under the supervision of the Court.

53.4. *Action by the Community.* When an action has been filed by the General Council for the Community to dissolve a corporation and it is established that liquidation of its business and affairs should precede the entry of a decree of dissolution.

53.5. *Shareholders not Necessary Parties.* It shall not be necessary to make shareholders parties to any such action or proceeding unless relief is sought against them personally.

SECTION 54

54.0. *Procedure in Liquidation of Corporation by the Shakopee Mdewakanton Sioux Community Court.* In proceedings to liquidate the assets and business of a corporation, the Shakopee Mdewakanton Sioux Community Court shall have the power to issue injunctions, to appoint a receiver or receivers *pendente lite,* with such powers and duties as the

court, from time to time, may direct, and to take such other proceedings as may be requisite to preserve the corporate assets wherever situated, and carry on the business of the corporation until a full hearing can be had.

54.1. After a hearing had upon such notice as the Shakopee Mdewakanton Sioux Community Court may direct to be given to all parties to the proceedings and to any other parties in interest designated by the Court, the Court may appoint a liquidating receiver or receivers with authority to collect the assets of the corporation, including all amounts owing to the corporation by subscribers on account of any unpaid portion of the consideration for the issuance of shares. Such liquidating receiver or receivers shall have authority, subject to the order of the Court, to sell, convey and dispose of all or any part of the assets of the corporation wherever situated, either at public or private sale. The assets of the corporation or the proceeds resulting from a sale, conveyance or other disposition thereof shall be applied to the expenses of such liquidation and to the payment of the liabilities and obligations of the corporation, and any remaining assets or proceeds shall be distributed among its shareholders according to their respective rights and interests. The order appointing such liquidating receiver or receivers shall state their powers and duties. Such powers and duties may be increased or diminished at any time during the proceedings.

54.2. The Shakopee Mdewakanton Sioux Community Court shall have power to allow from time to time as expenses of the liquidation compensation to the receiver or receivers and to attorneys in

the proceeding, and to direct the payment thereof out of the assets of the corporation or the proceeds of any sale or disposition of such assets.

54.3. A receiver of a corporation appointed under the provisions of this section shall have authority to sue and defend in all courts in his own name as receiver of such corporation. The court appointing such receiver shall have exclusive jurisdiction of the corporation and its property, wherever situated.

SECTION 55

55.0. *Filing of Claims in Liquidation Proceedings.* In proceedings to liquidate the assets and business of a corporation, the Shakopee Mdewakanton Sioux Community Court may require all creditors of the corporation to file with the Clerk of Court or with the receiver, in such form as the Court may prescribe, proofs under oath of their respective claims. If the Court requires the filing of claims it shall fix a date, which shall be not less than four months from the date of the order, as the last day for the filing of claims, and shall prescribe the notice that shall be given to creditors and claimants of the date so fixed. Prior to the date so fixed, the Court may extend the time for the filing of claims. Creditors and claimants failing to file proofs of claim on or before the date so fixed may be barred, by order of the Court from participating in the distribution of the assets of the corporation.

SECTION 56

56.0. *Discontinuance of Liquidation Proceedings.* The liquidation of the assets and business of a corporation may be discontinued at any time during the liquidation proceedings when it is established that cause for liquidation no longer exists. In such event the Court shall dismiss the proceedings and direct the receiver to redeliver to the corporation all its remaining property and assets.

SECTION 57

57.0. *Decree of Involuntary Dissolution.* In proceedings to liquidate the assets and business of a corporation, when the costs and expenses of such proceedings and all debts, obligations and liabilities of the corporation shall have been paid and discharged and all of its remaining property and assets distributed to its shareholders, or in case its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts and obligations, all the property and assets have been applied so far as they will go to their payment, the Shakopee Mdewakanton Sioux Community Court shall enter a decree dissolving the corporation, whereupon the existence of the corporation shall cease.

SECTION 58

58.0. *Filing of Decree of Dissolution.* In case the Shakopee Mdewakanton Sioux Community Court shall enter a decree dissolving a corporation, it shall be the duty of the Clerk of Court to cause a certified copy of the decree to be filed with the Clerk of Court. No fee shall be charged by the Clerk of Court for the filing thereof.

SECTION 59

59.0. *Deposit with the Shakopee Mdewakanton Sioux Community Court of Amount Due Certain Shareholders.* Upon the voluntary or involuntary dissolution of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found, or who is under disability and there is no person legally competent to receive such distributive portion, shall be reduced to cash and deposited with the Shakopee Mdewakanton Sioux Community Court and shall, upon *ex parte* petition, or such other proceeding as the Court deems proper, be paid over to such creditor or shareholder or to his legal representative upon proof satisfactory to the Court of his right thereto.

SECTION 60

60.0. *Survival of Remedy After Dissolution.* The dissolution of a corporation:

(1) by the issuance of a certificate of dissolution by the Clerk of Court, or

(2) by a decree of Shakopee Mdewakanton Sioux Community Court when the Court has not liquidated the assets and business of the corporation as provided in this Ordinance, or

(3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the

date of such dissolution. Any such action or proceeding be or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two years so as to extend its period of duration.

SECTION 61

61.0. *Effect of Invalidity of Part of this Ordinance.* If the Shakopee Mdewakanton Sioux Community Court shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section or part of this Ordinance, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this Ordinance, but the effect thereof shall be confined to the clause, sentence, paragraph, section or part of this Ordinance as adjudged to be invalid or unconstitutional.

SECTION 62

62.0. *Effective Date.* This Ordinance shall be in full force and effect according to its terms from and after February 16, 1991.

SECTION 63

63.0. *Authority.* This Ordinance is enacted by the Shakopee Mdewakanton Sioux Community General

Council under the authority vested in said council by Section 1, Subsections e, h, k, and n of Article V of the Constitution and Bylaws of the Shakopee Mdewakanton Sioux Community as amended. The General council reserves the right to repeal or amend the provisions of this Ordinance, provided that such action to repeal or amend is approved upon a finding by the Shakopee Mdewakanton Sioux Community Court on an action for declaratory judgment, that such amendment or repeal is in the best interest of the Community. A corporation incorporated under or governed by this Ordinance is subject to this reserved right.

SECTION 64

64.0 *Corporation Contracts Preserved.* Otherwise lawful contracts and other obligations of any corporation shall not be impaired by any subsequent action of the Community or its General Council. No corporation wholly owned by the Shakopee Mdewakanton Sioux Community may be dissolved under Section 44 unless all contracts, debts and obligations of the corporation are first satisfied.

64.1 Actions to restrain any attempts to impair contracts of tribal corporations, or to declare such actions null and void, shall be available to any interested party in Shakopee Mdewakanton Sioux Community Court. If the court finds for the plaintiff in any such action, it shall award treble damages, including all costs, attorney fees and disbursements. Nothing in this Section 64.0 shall be construed to restrict the general application of law, or of this Ordinance to the acts and contracts of tribal corporations.

SECTION 65

65.0 *Fees.* The Clerk of Court may establish such fees for filing or amending corporation articles or bylaws, as may be reasonable and proper.

SECTION 66

66.0 *Consent of General Council Required for Creation of Corporations Wholly or Partially Owned by the Community.* The prior consent of the General Council shall be required, prior to the creation, under this Ordinance, of any corporation wholly or partially owned by the Community.

SECTION 67

67.0 *Remedies and Penalties.* The Shakopee Mdewakanton Sioux Community Court shall have the authority to determine, apply and enforce appropriate remedies and penalties, including, but not limited to, civil fines, for violations of this Ordinance, or of the Articles of incorporation or bylaws of any Corporation formed pursuant to this Ordinance. The remedies available to Corporations, their shareholders, and Members, shall include declaratory and injunctive relief, and special writs of *mandamus,* to compel actions necessary to secure the rights, obligations or privileges of such parties, whether or not those rights, obligations or privileges arise under this Ordinance. A prevailing Plaintiff in any action shall be awarded costs and reasonable attorneys fees.

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY
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Tribal Office (612) 445-8900
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(LOGO)

OFFICERS

STANLEY R. CROOKS
Chairperson

KENNETH ANDERSON
Vice Chairperson

DARLENE MATTA
Secretary/Treasurer

RESOLUTION 11-05-92-001

**AMENDMENT TO
THE SHAKOPEE MDEWAKANTON SIOUX
COMMUNITY CORPORATION ORDINANCE**

WHEREAS, the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community is the governing body of the Community; and

WHEREAS, the General Council is empowered through Article V of the amended Constitution of the Shakopee Mdewakanton Sioux Community to promulgate and enforce ordinances intended to promote the general welfare of the Community by regulating the conduct of trade and the use and disposition of property upon the reservation; and

WHEREAS, the General Council has, in an exercise of this power, passed an ordinance, governing in all facets the formation, structure, operation and activities of corporations

chartered under the laws of the Shakopee Mdewakanton Sioux Community, which Ordinance is known as the Shakopee Mdewakanton Sioux Community Corporation Ordinance (Shakopee Corporation Ordinance), 2-27-91-0004; and

WHEREAS, the Shakopee Corporation Ordinance is for the most part sound law, however time and experience have shown the Ordinance to be deficient in certain crucial respects; and

WHEREAS, many of these deficiencies, particularly with regard to the Community's wholly owned corporation, have been noted by members of the General Council; and

WHEREAS, the General Council recognizes that the laws of the Community should first and foremost function in the best interests of the Community, and should protect the interests of the Community before the interests of all other parties; and

WHEREAS, the General Council has determined it to be in the best interests of the Community to address the deficiencies in the Shakopee Corporation Ordinance; and

WHEREAS, the General Council has determined that amendment of the Shakopee Corporation Ordinance is necessary to address the deficiencies so noted.

NOW THEREFORE BE IT RESOLVED, that the General Council hereby amends the Shakopee Corporation Ordinance, which amendment adds a number of sections to the Shakopee Corporation Ordinance as it is currently

enacted; and which amendment is a necessary measure undertaken to protect the interests of the Community, and which amendment is hereby declared to be in the Community's best interests, as follows:

AMENDMENT TO THE SHAKOPEE CORPORATION ORDINANCE

ADDITION OF SECTION 4.21 TO SECTION 4.

Section 4, General Powers.

4.21 Any and all interests in real property, whether of a tangible or intangible nature, which any corporation wholly or partially owned by the Community now possesses, or might in the future acquire by grant, gift, devise, loan, purchase, lease, or any other means may not be encumbered without the consent and prior written approval of a majority of the Members/shareholders of the Corporation.

The requirements of this section do not apply to the following actions when undertaken by the board of directors;

(1) Granting easements for any purpose deemed necessary by the board of directors; and

(2) Granting license, authorization or permission of any kind to any persons to enter onto the corporate property for any purpose.

ADDITION OF SECTION 4.22 TO SECTION 4.

4.22 No corporation wholly or partially owned by the Community may purchase any interest in real property, whether that property be of a tangible or intangible nature, without the consent and

prior written approval of a majority of the Members/shareholders of the Corporation.

ADDITION TO SECTION 38.

Section 38, Meetings of Shareholders and Members.

38.5 In the case of a corporation wholly or partially owned by the Community, the Articles of Incorporation shall specifically state the matters which may be raised by the Members/shareholders at either the regular or a special meeting.

The following matters shall always be considered to be properly before a regular or special meeting of the Members/shareholders, and may be raised by any Member/shareholder at any Members'/Shareholders' meeting, and it shall be unlawful for a corporation to exclude them from consideration by the Members/shareholders, either through the use of provisions in the corporate articles or bylaws or otherwise:

(a) Nomination and election of the directors;

(b) Consideration of the annual budget;

(c) Any sale of any corporate asset with a value in excess of $500,000;

(d) The formation of corporate subsidiaries;

(e) Purchase of another existing corporation by a Community owned corporation;

(f) The merger of a Community owned corporation with another Corporation, whether or not the second corporation is Community owned; and

(g) The amendment of the Articles of Incorporation or the corporate bylaws.

ADDITION TO SECTION 38.

38.6 The following actions may not be undertaken by the board of directors of a corporation wholly or partially owned by the Community without the consent and prior written approval of a majority of a quorum of the Members/shareholders at a regular or special meeting held for the purpose of obtaining such approval:

(a) Approval of the annual budget;

(b) Expenditures in excess of the levels approved in the annual budget;

(c) The sale of any corporate asset with a value in excess of $500,000;

(d) Merger of a Community owned corporation with another corporation;

(e) The formation of corporate subsidiaries;

(f) Purchase of another existing corporation by a Community owned corporation; and

(g) Amendment of the articles of incorporation or the corporate bylaws.

For the purposes of this section, (a) and (b) above, a quorum shall consist of 1/3 of the Members/shareholders of the corporation. For the purposes of this section, (c), (d), (e), (f), and (g) above, a quorum shall consist of a majority of the Members/shareholders.

ADDITION TO SECTION 38.

38.7 The Members/shareholders of any corporation wholly or partially owned by the Community may require the board of directors, by majority

vote of a quorum of the eligible voting Members/shareholders of the corporation, to take certain actions regarding any of the subjects in Sections 4.21, 4.22, 38.6, or 38.7 when deemed in the best interests of the corporation and the Community. For purposes of this Section, a quorum shall consist of 1/3 of the eligible voting Members/shareholders of the corporation.

ADDITION TO SECTION 22.

Section 22, Number and Election of Directors.

22.1 *Number and election of Directors of Community Owned Corporations.* A corporation wholly or partially owned by the Community shall be required to have no less than three directors. The initial directors may be named in the Articles of Incorporation. Subsequent directors will be nominated by the Members/shareholders at the annual meeting. The Members/shareholders will then vote on the nominees, and the nominees with the highest vote totals will serve for the next term.

The members of the board of directors of any corporation wholly or partially owned by the Community serving at the time of this amendment shall complete their present term of office as a director before their position shall be filled in accordance with the terms of this section.

ADDITION TO SECTION 26.

Section 26, Vacancies on the Board.

26.1 *Vacancies on the Board of Community Owned Corporations.* All vacancies on the board of a corporation wholly or partially owned by the

Community shall be filled by election at a special meeting of the corporation called for the purpose of filling the vacancy, at which all Members/shareholders shall be entitled to vote. The Members/shareholders shall nominate and vote on eligible persons to fill the vacancy, and the nominee with the highest vote total shall serve out the respective term of office.

ADDITION TO SECTION 13.

Section 13, Concerning the Articles of Incorporation and the Corporate Bylaws.

13.8 *Provisions Not Subject to Modification in the Articles or bylaws.* The following provisions of the Shakopee Corporation Ordinance, relating only to corporations wholly or partially owned by the Community, must be included in the Articles of Incorporation, and shall not be subject to modification in the corporate Articles or bylaws:

(a) Section 4.21, regarding encumbrances of real property;

(b) Section 4.22, regarding purchases of real estate;

(c) Section 22.1, regarding the selection of candidates for the board of directors and the election of directors to the board;

(d) Section 26.1, regarding the manner in which vacancies on the board of directors shall be filled;

(e) Section 38.5, regarding the matters which might properly be considered by the Members/shareholders at a Member's/shareholders' meeting;

(f) Section 38.6, regarding matters undertaken by the board of directors which will not be considered legitimate without prior approval by the Members/shareholders; and

(g) Section 38.7, regarding matters deemed to be in the Community's and the corporation's best interests, and which the board of directors must undertake upon approval by a majority vote of the Members/shareholders.

ADDITION TO SECTION 63.

Section 63, Authority.

63.1 *Effect of Future Amendments.* Any action to repeal or amend this Ordinance, when approved by the Shakopee Mdewakanton Sioux Community General Council, and upon the issuance of a declaratory judgment by the Mdewakanton Sioux Community Court that such amendment is in the best interests of the Community, shall have immediate full force and effect upon all corporations chartered under this Ordinance, whether in existence at the time of amendment or subsequently chartered.

CERTIFICATION

This Resolution was presented to the General Council of the Shakopee Mdewakanton Sioux Community at a meeting

held on 11/5, 1992. The vote on this Resolution was 33 for, 29 against, and 2 abstentions.

/s/ Glynn Crooks
Moved by

/s/ Cindy Picket
Seconded by

/s/ Stanley R. Crooks
Stanley R. Crooks,
Chairman

/s/ Kenneth Anderson
Kenneth Anderson,
Vice-Chairman

/s/ Darlene Matta
Darlene Matta, Secretary-Treasurer

CERTIFICATION

These Resolutions at the Special General Council Meeting November, 5, 1992; Resolution No. 11-05-92-001 was presented to the General Council of the Shakopee Mdewakanton Sioux Community at a Special General Council Meeting held on November 5, 1992.

There are 73 eligible voters pursuant to the voting list certified and posted by the Secretary/Treasurer on October 19, 1992.

To the best of my knowledge and belief, the results reported herein accurately reflect the vote of the General Council.

The vote on Resolution No. 11-05-92-001 Amendment to The Shakopee Mdewakanton Sioux Community Corporation Ordinance was:

33 FOR, 29 AGAINST, 2 ABSTENTIONS, 0 SPOILED

This Resolution PASSED X FAILED _

/s/ Stanley R. Crooks
Stanley R. Crooks,
Tribal Chairman

/s/ Kenneth Anderson
Kenneth Anderson,
Vice Chairperson

/s/ Darlene Matta
Darlene Matta,
Secretary/Treasurer

/s/ Randolph J. Schacht
Randolph J. Schacht,
Election Commissioner

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

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PRIOR LAKE, MINNESOTA 55372
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(LOGO)

OFFICERS

Stanley R. Crooks
Chairman

Glynn A. Crooks
Vice Chairman

Susan Totenhagen
Secretary/Treasurer

RESOLUTION NO. 11-12-96-001
ENACTMENT OF TORT CLAIMS ORDINANCE

WHEREAS, the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community is the governing body of the Community; and

WHEREAS, the General Council is empowered through Article V, Section 1(e) of the Constitution to manage the economic affairs of the Community; and

WHEREAS, the General Council is empowered through Article V, Section (h) of the Constitution to promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety and general welfare of the Community; and

WHEREAS, the General Council has considered the need for a means to address tort claims brought against the Community or its entities; and

WHEREAS, the General Council is aware of the need to provide those persons and organizations that do business with or are guests of the Community and the Community's entities and instrumentalities with a forum for redress of their legitimate claims which may otherwise be barred due to the Shakopee Mdewakanton Sioux (Dakota) Community's sovereign immunity from suit; and

WHEREAS, the General Council has determined that the Community's insurers should pay compensation for damages suffered due to injury to or loss of property, or personal injury or death, where such losses or damages are caused by an act or omission of an employee of the Community while functioning within the scope of the duties of that person's office or employment, under those circumstances where the Community, if a private person, would be liable to the claimant.

NOW THEREFORE BE IT RESOLVED, that the Shakopee Mdewakanton Sioux (Dakota) Community hereby approves and adopts for enactment the attached Shakopee Mdewakanton Sioux (Dakota) Community Tort Claims Ordinance (the "Ordinance"), and directs that the same be forwarded to the Secretary of the Interior or his delegate for approval pursuant to the Constitution of the Community.

BE IT FURTHER RESOLVED, that the Shakopee Mdewakanton Sioux (Dakota) Community hereby waives its sovereign immunity from suit for the limited purpose

of permitting claims made against the Community pursuant to the Ordinance to be brought in Tribal Court, and to permit damages to be awarded against the Community to the extent provided for in Section 5 of the Ordinance, provided the damages are payable from the proceeds of an insurance policy.

/s/ Joe Brewer
Moved by

/s/ Danny Crooks
Seconded by

/s/ Stanley R. Crooks
Stanley R. Crooks,
Chairman

/s/ Glynn Crooks
Glynn Crooks, Vice-Chairman

/s/ Susan Totenhagen
Susan Totenhagen,
Secretary Treasurer

CERTIFICATION

Regular General Council Meeting of November 12, 1996

This Resolution No. 11-12-96-001 was presented to the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community at a Regular General Council meeting held on November 12, 1996. There are 111 eligible voters pursuant to the voting list certified and posted by the Secretary/Treasurer on Sept. 11, 1996.

To the best of my knowledge and belief, the results reported herein accurately reflect the vote of the General Council at the meeting on November 12, 1996.

The Vote on Resolution No. 11-12-96-001 was:

38 For, 0 Against, 0 Spoiled, 2 Abstentions; and 1 Chair not voting

X Passed _Failed

/s/ Joe Brewer
Moved by

/s/ Danny Crooks
Seconded by

/s/ Stanley R. Crooks
Stanley R. Crooks,
Chairman

/s/ Glynn Crooks
Glynn Crooks, Vice-Chairman

/s/ Susan Totenhagen
Susan Totenhagen,
Secretary/Treasurer

/s/ Randolph J. Schacht
Randolph J. Schacht,
Election Commissioner

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY TORT CLAIMS ORDINANCE

Section 1. Policy

It is the policy of the Shakopee Mdewakanton Sioux (Dakota) Community in the enactment of this Ordinance to exercise its retained inherent sovereignty to implement Community governmental powers, which powers are hereby declared by the Community to be of the same nature as all other Community sovereign powers, and which may be exercised by the Community pursuant to the provisions of the Shakopee Mdewakanton Sioux (Dakota) Community Constitution.

1.02. *Constitutional Authority.* The Constitution of the Shakopee Mdewakanton Sioux (Dakota) Community, Article V provides for the exercise of legislative powers by the Community acting through the General Council to further the economic advancement of the Shakopee Mdewakanton Sioux (Dakota) people. More specifically, this Ordinance is enacted by the Shakopee Mdewakanton Sioux (Dakota) Community General Council under the authority vested in said General Council by Section 1, Subsections (e), (h) and (l) of Article V of the Constitution of the Shakopee Mdewakanton Sioux (Dakota) Community as amended. The General Council reserves the right to repeal or amend the provisions of this Ordinance as necessary.

Section 2. Purpose

The Shakopee Mdewakanton Sioux (Dakota) Community enacts this Tort Claims Ordinance in order to provide those persons and organizations that do business with or

are guests of the Community and the Community's entities and instrumentalities with a forum for redress of their legitimate claims which may otherwise be barred due to the Shakopee Mdewakanton Sioux (Dakota) Community's sovereign immunity from suit. Therefore, the Community will pay compensation for damages suffered due to injury to or loss of property, or personal injury or death, where such losses or damages are caused by an act or omission of an employee of the Community while functioning within the scope of the duties of that person's office or employment, under those circumstances where the Community, if a private person, would be liable to the claimant.

Section 3. Definitions

(A) *Shakopee Mdewakanton Sioux (Dakota) Community* means the Community and all subentities thereof, whether governmental or commercial in nature, including, without limitation, the General Council, the Business Council, any committee or agency thereof, any corporate entity, the Tribal Court, and any other entity commissioned or created by the General Council (hereinafter collectively referred to as the "Community", unless noted otherwise), or by the Business Council.

(B) *Employee of the Community* means all elected officials, all officers, and all other persons employed by the Community.

(C) *Acting within the scope of office or employment* means execution by any employee of the Community of the duties, responsibilities, authorities, powers and functions

of employees in that person's position, whether acting in a governmental, business, professional, or other capacity.

Section 4. Waiver of Sovereign Immunity, Liability of the Community

(A) The Community hereby expressly waives its sovereign immunity from suit for the limited purpose of permitting claims made against the Community pursuant to this Ordinance to be brought in Tribal Court, and to permit damages to be awarded against the Community to the extent provided for in Section 5 herein, provided the damages are payable from the proceeds of an insurance policy. The Community will pay, from the proceeds of an insurance policy, compensation for injury to or loss of property, or for personal injury or death, caused by an act or omission of an employee of the Community while acting within the scope of office or employment, under circumstances where the Community, if a private person, would be liable to the claimant.

(B) The limited waiver of the Community's sovereign immunity from suit provided in paragraph A of this Section shall not extend to cases filed pursuant to this Ordinance in any jurisdiction other than the Shakopee Mdewakanton Sioux (Dakota) Tribal Court. The Community expressly retains its sovereign immunity from suit for all claims brought in all federal, state, and other tribal courts and in any federal, state, and tribal agency or administrative body. The Community further expressly retains its sovereign immunity from suit for those causes of action which are not covered by an insurance policy. Nothing contained herein shall prohibit the Community

from waiving its sovereign immunity to permit claims in excess of the amounts identified in Section 5 hereof, or to permit claims accruing prior to the date of this Ordinance, but only if such claims are heard in the Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court.

(C) The remedies against the Community provided by this Ordinance, whether for damages or injury to or loss of property, or for damages awarded to compensate for personal injury or death caused by an act or omission of an employee of the Community while acting within the scope of office or employment, is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter, whether the claim is made against the employee whose act or omission gave rise to the claim, against the estate of such employee, or against the Community as the employer of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the Community, the employee or the employee's estate is precluded without regard to when the act or omission occurred. Double recovery is prohibited.

Section 5. Limits

The liability of the Community provided in Section 4 of this Ordinance shall not exceed two hundred fifty thousand dollars ($250,000) per claim, or one million dollars ($1,000,000) for multiple claims arising out of a single event or occurrence, exclusive of interest accruing prior to judgment, or punitive damages. The Community

retains the right, where limited circumstances may warrant, to waive its sovereign immunity for claims of a higher amount.

Section 6. Jurisdiction

The Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall have original and exclusive jurisdiction to hear claims brought pursuant to this Ordinance, subject to the terms of the Ordinance, and all claims not brought in the Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall be deemed invalid.

Section 7. Exclusions

Without intent to preclude the Shakopee Mdewakanton Sioux (Dakota) Tribal Court from finding additional cases where the Community and its employees should not, in equity and good conscience, pay compensation for injury to or loss of property, or for personal injury or death, the Community and its employees are not liable for the following losses:

(A) a loss caused by an act or omission of a Community employee exercising due care in the execution of a valid or invalid statute, rule, ordinance or resolution;

(B) a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused;

(C) a loss in connection with the assessment and collection of taxes;

(D) a loss other than one sustained from injury to or loss of property, or from personal injury or death; and

(E) a loss based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the Community, its employees or agents.

Section 8. Defenses

With respect to any claim under this Ordinance, the Community hereby expressly retains its sovereign immunity from suit except as such sovereign immunity would be inconsistent with the provisions of this Ordinance. The Community shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the Community whose act or omission gave rise to the claim, as well as any other defenses to which the Community is entitled.

Section 9. Statute of Limitations

The statute of limitations for all claims brought against the Community is two (2) years and the right to bring a claim against the Community shall begin to accrue on the date of the act or omission giving rise to the claim, or on the date a reasonable person under the same or similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community.

Section 10. Procedure

(A) An action shall not be instituted upon a claim against the Community for injury to or loss of property, or for personal injury or death, caused by an act or omission of any employee of the Community while acting within the scope of that person's office or employment, unless the claimant shall have first presented the claim to legal counsel of the Community.

(B) Legal counsel of the Community shall determine whether the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.

(C) Upon certification by legal counsel that the defendant employee was acting within the scope of that person's office or employment at the time of the incident out of which the claim arose, the civil action or proceeding shall be deemed an action against the Community under the provisions of this Ordinance and the Community shall be substituted as the party defendant.

(D) In the event that legal counsel has refused to certify that the employee was acting within the scope of that person's office or employment at the time of the incident out of which the claim arose, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of that person's office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the Community under the provisions of this Ordinance, and the Community shall be substituted as the party defendant.

(E) Nothing in this Section shall prevent a claimant from reaching a settlement with the legal counsel of the Community prior to instituting the procedure outlined in this Section.

Section 11. Indemnification of Community Employees

The Community shall indemnify and hold harmless its employees from and against any and all suits, demands, actions, losses, claims, damages, expenses, liabilities, cross-claims and counter-claims, of whatever nature, and costs (including reasonable attorneys' fees in defending against claims) related to, arising out of, based on, or in connection with performing duties within the scope of the employees job or office, where it is determined that the employee acted within their scope of employment or office. The Community is under no duty to indemnify those employees who have not been certified to have acted within the scope of employment or office.

Section 12. Settlement

(A) Legal counsel for the Community is authorized to determine, adjust and settle, at any time, any claim for money damages of $25,000 or less against the Community for injury to or loss of property, or for personal injury or death, caused by an act or omission of any employee of the Community while acting within the scope of office or employment, under circumstances where the Community, if a private person, would be liable to the claimant. The settlement is final and conclusive on all officers and employees of the Community, unless procured by fraud. The acceptance by the claimant of a settlement is final

and conclusive on the claimant and constitutes a complete release of any claim against the Community and the employee or officer of the Community whose act or omission gave rise to the claim, by reason of the same subject matter.

(B) Legal counsel for the Community is authorized to institute settlement discussions regarding any claim for money damages in excess of $25,000 and the Business Council of the Community shall have the authority, upon unanimous vote of all members thereof, to accept or reject a proposed settlement reached by the Community's legal counsel and the claimant(s).

Section 13. Attorney's Fees

No attorney licensed or admitted to practice before the Shakopee Mdewakanton Sioux (Dakota) Tribal Court may charge, demand, receive, or collect for services rendered, fees in excess of twenty-five (25) percent of any judgment rendered pursuant to this Ordinance or in excess of twenty (20) percent of any settlement made pursuant to this Ordinance. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this Section shall be fined not more than $2,000 and shall lose her or his privilege to practice law before the Shakopee Mdewakanton Sioux (Dakota) Tribal Court.

Section 14. Subrogation

(A) Third parties such as insurance companies, guarantors, bonding companies and other similar organizations

shall be permitted to bring a claim pursuant to this Ordinance in the name of the claimant, provided, however, that such third party shall show that it is expressly permitted to bring a claim and that it has paid a debt to the claimant. No third party shall be entitled to receive compensation pursuant to this Ordinance in an amount greater than that already paid to the claimant. The Shakopee Mdewakanton Sioux (Dakota) Tribal Court may refuse to allow a third party to bring a claim pursuant to this Ordinance when equity so requires.

(B) The appropriate Community insurance carrier shall be permitted to defend on behalf of the Community a claim brought pursuant to this Ordinance.

Supreme Court, U.S.
FILED
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(3)

No. 96-1215

In The

Supreme Court of the United States

October Term, 1996

JILL GAVLE,

Petitioner,

v.

LITTLE SIX, INC., A FOREIGN CORPORATION d/b/a MYSTIC LAKE CASINO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE IN SUPPORT OF PETITIONER

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8 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF TRIBAL ACCOUNTABILITY LEGAL RIGHTS FUND, INC. IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, Tribal Accountability Legal Rights Fund, Inc., moves this Court for leave to file the attached brief *amicus curiae* in support of the petitioner. The petitioner has consented to the filing of this brief; however, the respondent has refused to provide consent.

Tribal Accountability Legal Rights Fund, Inc. (hereinafter Tribal Accountability) is a Minnesota not-for-profit organization dedicated to assisting individuals, Native American and non-Native American alike, that are adversely affected by Native American tribal officials hiding behind the shield of tribal sovereignty.

Tribal Accountability believes the instant case provides the Court with an appropriate opportunity to re-examine the varied and inappropriate applications of the holding of *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831) by federal and state courts.

A predicate to the defense of tribal sovereign immunity is that the tribe in question (the Shakopee Mdewakanton Sioux Community in the instant matter) possess some significant measure of sovereign capacity. The error perpetuated by the Minnesota Supreme Court and other federal and state courts is the assumption that all Native American tribes possess some significant measure of sovereignty. This is a fundamental error which requires correction and the instant case is an appropriate vehicle to revisit this important issue.

In view of its great familiarity with the issue of tribal sovereignty and wide spread abuses of the defense of tribal sovereign immunity, Tribal Accountability respectfully requests that it be allowed to participate in this case and to file the attached brief *amicus curiae* in support of petitioner.

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Dated: March 1, 1997

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Tribal Accountability Legal Rights Fund, Inc., a Minnesota not-for-profit organization, is dedicated to assisting individuals, Native American and non-Native American alike, that are adversely affected by Native American tribal officials that use the shield of tribal sovereign immunity as a license to commit tortious acts in commercial activities without fear of paying damages. In the instant matter Petitioner alleged numerous tortious acts against Respondent (a Native American tribal commercial entity), but was unable to proceed in the Minnesota state courts because "the sovereign immunity of the Shakopee Mdewakanton Sioux (Dakota) Community extends to (Respondent) and is a bar to this suit in state court." Gavle v. Little Six, Inc., 555 NW2d 284, 287 (Minn. 1996). Tribal Accountability believes, *inter alia*, that the affirmative defense of tribal sovereignty immunity should not extend to tribal commercial activities and that this is especially true when the tribal group in question has only the illusion of sovereignty.

SUMMARY OF ARGUMENT

A predicate to the affirmative defense of tribal sovereign immunity is that the tribe in question possess some significant measure of sovereign capacity. As a matter of domestic law, this Court determined the Cherokee Nation was a dependent, domestic nation completely under the sovereignty and dominion of the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Subsequently, this Court recognized that the Cherokee Nation was a distinct community, occupying its own territory, with boundaries accurately described, within which state law

had no force. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832).

Unfortunately, the dependent, domestic nation status was extended to all other Native American tribes without regard to their actual capacity to exercise sovereign power over their internal and external affairs. *See,* e.g., *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269 (1959). It is one thing to extend such recognition to the Cherokee Nation with its sophisticated government and significant capacity for commercial intercourse and quite another to extend the same recognition to the Shakopee Mdewakanton Sioux Community with less than 300 members and 293 acres of territory.

Before the affirmative defense of tribal sovereign immunity is extended to a Native American tribe, a factual inquiry must be made into its capacity to exercise internal and external sovereign powers. It is posited that in the instant matter, such an inquiry will reveal the Shakopee Mdewakanton Sioux Community lacks the capacity to exercise any substantial measure of sovereignty.

ARGUMENT

I. A PREDICATE TO THE AFFIRMATIVE DEFENSE OF TRIBAL SOVEREIGN IMMUNITY IS THAT THE TRIBE ASSERTING THE DEFENSE POSSESS SIGNIFICANT SOVEREIGN CAPACITY.

In *Cherokee Nation v. Georgia,* 30 (5 Pet.) 1 (1831) this Court determined the Cherokee Nation was a domestic, dependent nation under the sovereignty and dominion of the United States of America. Subsequently, this Court recognized the Cherokee Nation as a distinct community, occupying its own territory, with boundaries accurately described, within which state law had no force or effect.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Unfortunately, dependent, domestic nation status was extended to all other Native American tribes without regard to their actual capacity to exercise sovereign power over their internal and external affairs. *See*, e.g., *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959).

Extending domestic, dependent nation status to all Native American tribes is inapposite because not all Native American tribes are equally capable of exercising internal and external sovereign powers. This Court recognized the "nation-like" status of the Cherokee Nation because of the relative sophistication, *inter alia*, of the Cherokee government and society.[1] The Shakopee Mdewakanton Sioux Community cannot make such a claim.

Although *Cherokee Nation v. Georgia*, 30 (5 Pet.) 1 (1831) determined the Cherokee Nation was not an international personality, nonetheless, the physical requirements and juristic qualifications of international personalities provide instructive criteria for evaluating the measure of sovereign capacity possessed by Native American tribes.

To gain acceptance in the society of nations, an aspiring entity must substantially satisfy certain physical requirements: *viz.*, territory, population and government.

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[1] The Cherokee society was quite sophisticated with, for example, schools, newspapers printed in the Cherokee language, courts, criminal and civil codes and government. Nonetheless, even the Cherokee Nation could not withstand the expanding power of the United States of America and was forced to remove themselves on "the Trail of Tears" to Oklahoma. See Swindler, Politics As Law: The Cherokee Cases, 3 Am. Ind. L. Rev. 7 (1975).

In other words, *de facto* existence is a predicate to *de jure* existence.

An international personality must be able to exercise extensive (and in the case of a nation-state, exclusive) control over a certain, defined territory. It is not necessary that the territory be exactly fixed, but it should not be so minuscule as to be considered illegitimate. See D. Grieg, International Law 94 (2d ed. 1976). Moreover, the population must inhabit an area over which the government exercises authority to the substantial exclusion of other, external entities.

Although publicists do not attempt to define the quantity of individuals necessary to constitute a population, generally a sufficiently cohesive population must exist to control the territory claimed and a majority must habitually obey a centrally constituted governmental authority. T. Lawrence, The Principles of International Law §35 (7th rev. ed. 1923). Further, a certain, albeit undefined, level of civilization is required. Dickinson, The Equality of States in International Law 223-29 (1920).

While the law of nations has little concern with the form, character or power of the government of a State, Phillimore, 2 Commentaries Upon International Law 81 (3rd ed. 1879), the government must be capable of providing independent internal leadership, a method of conflict resolution for the population and capacity for adapting to changed circumstances consistent with the requirements of civilization. H. Hart, Concept of Law 89 (1961); T. Lawrence, The Principles of International Law §35 (7th rev. ed. 1923).

The foregoing principles of international law provide criteria for evaluating whether, and to what extent, the Shakopee Mdewakanton Sioux Community has the capacity to exercise internal and external sovereign

powers. Given the fact that the Community has less than 300 members and only 293 acres of territory, it is doubtful that the Community has sufficient sovereign capacity to provide a foundation for the assertion of the affirmative defense of tribal sovereign immunity.

The gravamen of the instant matter is that federal and state courts have treated all Native American tribes alike. They are not alike and they are not equally capable. This Court should revisit the "domestic, dependent nation" decision of *Cherokee Nation* and formulate criteria for evaluating the actual, or true, sovereign capacity of the various Native American tribes and, in turn, determine whether the affirmative defense of tribal sovereign immunity may be available for proprietary, commercial activities.

CONCLUSION

For the foregoing reasons, *amicus curiae* Tribal Accountability Legal Rights Fund, Inc. respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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